

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(1) OBLIGATIONS OF CONFIDENCE/401. Introduction.

CONFIDENCE AND DATA PROTECTION (

Secretary of State for Constitutional Affairs: transfer of functions

The functions of the Lord Chancellor under the Data Protection Act 1998 (except ss 6(4)(a), (b), 28, Sch 5 (in part) and Sch 6 paras 2, 3) and the Freedom of Information Act 2000 (except ss 15, 23, 24, 36, 46, 65, 66 and 53 (in part)) have been transferred to the Secretary of State for Constitutional Affairs: see the Secretary of State for Constitutional Affairs Order 2003, SI 2003/1887, arts 1(4), 4, Sch 1.

1. CONFIDENCE

(1) OBLIGATIONS OF CONFIDENCE

401. Introduction.

Although early isolated instances of protection for confidences can be found¹, the modern law dates essentially from the mid-nineteenth century, when the court restrained the unauthorised copying and advertising of etchings which the Prince Consort had arranged to have reproduced for private circulation². Obligations of confidence may now be of significance in governmental, commercial and personal contexts. In public law they may restrain undue publicity for the internal working of central and local government³.

These obligations have supplemented copyright⁴ and patent law⁵ by protecting related matters not falling within their limits. Whilst copyright protects the form of expression, confidence protects the substance, as when the plot of a play is not to be disclosed until the opening night⁶ or an idea for a dramatic work is communicated orally⁷. Confidence may protect an invention prior to the grant of a patent⁸ or provide alternative protection if it is not desired to make the public disclosures required for patenting. Obligations of confidence also enable employers to prevent the abuse of their trade secrets and goodwill by present and former employees⁹. In personal matters the protection of matrimonial and family confidences goes some way to making good the lack of general protection for privacy¹⁰ and the association of confidence with professional and fiduciary relationships furthers the proper attainment of their purposes¹¹.

1 *Duke of Queensberry v Shebbeare* (1758) 2 Eden 329 (printer restrained from publishing confidential material); *Thompson v Stanhope* (1774) Amb 737 (family letters); *Wyatt v Wilson* (1820) unreported (doctor); *Evitt v Price* (1827) 1 Sim 483 (accountant). The lines attributed to Sir Thomas More 'three things are to be held in Conscience, Fraud, Accident and Things of Confidence' (see *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 46) indicate a long history in equity.

There appears to be no distinction consistently drawn by the authorities or by statute between 'confidence' and 'confidentiality'. In this title the usage of the authority or statute relied on in any particular instance has been followed.

2 *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal 1 Mac & G 25.

3 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484 (diary of cabinet minister). Detriment is necessary for governmental confidences to give effect to a special element of public interest, but the question was specifically not decided in relation to private law confidences: see *A-G v*

Observer Ltd, A-G v Times Newspapers Ltd [1990] 1 AC 109 at 256-258, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 642-643, HL, per Lord Keith of Kinkel and at 281-282 and 659 per Lord Goff of Chieveley.

- 4 As to copyright see generally COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS.
- 5 As to patent law see generally PATENTS AND REGISTERED DESIGNS.
- 6 *Gilbert v Star Newspaper Co Ltd* (1894) 11 TLR 4. Cf *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443, CA.
- 7 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.
- 8 See the Patents Act 1977 s 2(4)(a),(b); *Prout v British Gas plc* [1992] FSR 478, Patents County Court (employer on notice that employee would apply for patent based on idea in confidential suggestion scheme); *Triplex Safety Glass Co Ltd v Scorah* [1938] Ch 211, [1937] 4 All ER 693.
- 9 See *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL; *Robb v Green* [1895] 2 QB 315, CA; *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239; *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350, CA; *Stevenson Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, 69 RPC 10, CA.
- 10 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611 (recently divorced defendant restrained from publishing matrimonial confidences); *Thompson v Stanhope* (1774) Amb 737 (letters of father to son); *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] NLJR 595 (photographic representation of the wedding of two celebrities had the quality of confidence about it). Contrast *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA (matrimonial confidences which had been the subject of previous voluntary disclosures could not be protected by the law of confidence).
- 11 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA (banker); *Carter v Palmer* (1839) 1 Dr & W 722 (affd (1842) 8 Cl & Fin 657) (barrister); *Davies v Clough* (1837) 8 Sim 262 (solicitor); *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414, DC (referring to doctor and priest); *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA (doctor).

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401 Introduction

NOTE 10--*Douglas*, cited, reversed in part: [2007] UKHL 21, [2008] 1 AC 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(1) OBLIGATIONS OF CONFIDENCE/402. Prerequisites of liability for breach of confidence.

402. Prerequisites of liability for breach of confidence.

If a party is to be held liable for breach of confidence it must be shown that: (1) the material communicated to him had the necessary quality of confidence; (2) it was communicated or became known to him in circumstances entailing an obligation of confidence; and (3) there was an unauthorised use of that material¹.

1 See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47-48 per Megarry J, who noted that some authorities require that the unauthorised use be to the detriment of the claimant, but left open the question whether detriment was necessary in every case; *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143 at 148, CA; *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260 at 276-277, CA (an obligation of confidence which is or becomes unreasonable may not be enforced even if detriment to the claimant is shown). See further para 482 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/403. Derivation and heads of jurisdiction.

(2) DERIVATION OF JURISDICTION

403. Derivation and heads of jurisdiction.

Obligations of confidence may be derived from contract¹, tort², equity³, property⁴ or bailment⁵ or may be imposed by statute⁶.

The courts have been flexible in handling these heads of jurisdiction so as to extend the scope and range of remedies. For example, two heads of liability have been relied on to eliminate consequences which might have resulted from their origins in common law and equity⁷. In contract, express terms have been supplemented by implied⁸ terms, and a case involving both contract and equity has been decided in equity alone to avoid problems of construing contractual terms⁹.

1 See para 404 post.

2 See para 405 post.

3 See para 406 post.

4 See para 407 post.

5 See para 408 post.

6 See para 409 post.

7 *Morison v Moat* (1851) 9 Hare 241 at 255; *Robb v Green* [1895] 2 QB 315 at 317-318, 319-320, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 213-214, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; contra *British Celanese Ltd v Moncrieff* [1948] Ch 564 at 578, [1948] 2 All ER 44 at 47, CA.

8 *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA; *Triplex Safety Glass Co Ltd v Scorah* [1938] Ch 211, [1937] 4 All ER 693; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; but see *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202, CA; *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA.

9 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/404. Contract.

404. Contract.

Contractual terms imposing obligations of confidence may be oral¹ or written, express or implied², but will be subject to the requirements of consideration³ and privity⁴ and hence may be narrower in scope than obligations arising under other heads of jurisdiction such as equity⁵. Compensatory damages will be available where such terms are breached whilst it is still doubtful whether such damages are generally available for breach of obligations in equity⁶.

The same facts and the same criteria which give rise to an implied contractual obligation of confidence may also found an equitable obligation of confidence⁷.

1 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101 (idea for television series).

2 *Lamb v Evans* [1893] 1 Ch 218 at 229, CA, per Bowen LJ (term implied to give 'that effect which the parties must have intended it to have and without which it would be futile'); *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239 at 244.

3 *New Zealand Needle Manufacturers Ltd v Taylor* [1975] 2 NZLR 33 at 40-41 (implied obligation of confidence found to evade failure of express term for lack of consideration).

4 The requirements of privity have also been evaded by finding an implied contract: *Mechanical and General Invention Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd* [1935] AC 346, HL; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 214-215, CA. As to the doctrine of privity generally, and the exceptions to it allowed by common law, equity and statute (eg the Contracts (Rights of Third Parties) Act 1999), see CONTRACT vol 9(1) (Reissue) para 748 et seq.

5 Thus where confidence involving a trade secret for a carpet grip arose in pre-contractual negotiations the court had recourse to equity: *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923.

6 See the ambiguous dicta in *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272 at 279 (on appeal [1957] RPC 207 at 214, CA); *Seager v Copydex Ltd* [1967] 2 All ER 415 at 419, [1967] 1 WLR 923 at 932; *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718 at 719, 721, [1969] 1 WLR 809 at 812, 814-815; *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418 at 421, [1986] 1 WLR 1419 at 1422.

In the extraordinary circumstance where a member of the Secret Intelligence Service broke an express contractual undertaking to the Crown not to divulge any confidential information during his period of service or after his employment had ceased, the obligation was considered 'akin to fiduciary' and, exceptionally, disgorgement of the defendant's gains from breach of contract could be ordered, amounting to a total account of profits: see *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL. However, in this case, the award was not seen as compensatory (since the Crown had suffered no loss from this particular breach); rather, it was intended to deprive the defendant of the precise gain he had made from trading on his notoriety and to have a deterrent effect on others who might be tempted to follow his example: *A-G v Blake (Jonathan Cape Ltd, third party)* supra at 286-288 and 399-400 per Lord Nicholls of Birkenhead. See also *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, further explaining the basis of damages awarded on the basis of compensation for a past infringement.

7 *Robb v Green* [1895] 2 QB 315, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/405. Tort.

405. Tort.

Many torts, such as inducing breach of contract¹, conspiracy², intimidation³, interference with business⁴ and conversion of chattels⁵, may involve the misuse or infringement of confidence. Some authorities, however, have treated a party imparting confidential information as having a right of property in that information, and infringement of this right may be an independent tort⁶. This duty of confidence has been discussed in terms similar to the duty of care⁷, the measure of damages in terms similar to that in tort⁸ and the defence of public interest for breach of confidence as similar to privilege in defamation⁹. On the other hand, however, it has been said that claims for breach of confidence do not arise in tort at all, but only within the equitable jurisdiction of the court¹⁰.

The Human Rights Act 1998 does not allow a cause of action in tort to be founded exclusively on the right to respect for private and family life, home and correspondence guaranteed in the Act¹¹.

1 See TORT vol 97 (2010) PARA 614 et seq. See also *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350, CA; *Bents Brewery Co Ltd v Hogan* [1945] 2 All ER 570; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147, CA; *Hamlyn v John Houston & Co* [1903] 1 KB 81, CA; *Summers & Co Ltd v Boyce* (1907) 23 TLR 724; *Lowenadler v Lee* (1924) 158 LT Jo 372; *Scophony Ltd v Traub* [1937] 4 All ER 279, CA; *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, HL; *BO Morris Ltd v F Gilman (BST) Ltd* (1943) 60 RPC 20; *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498. See further para 481 post.

2 See TORT vol 97 (2010) PARA 623 et seq. See also *Spermolin Ltd v John Winter* [1962] CLY 2441; *Westminster Chemical NZ Ltd v McKinley* [1973] 1 NZLR 659; *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, HL; *BO Morris Ltd v F Gilman (BST) Ltd* (1943) 60 RPC 20; *Greenwood & Batley Ltd v West* (1951) 68 RPC 268; *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260 at 267-268, CA.

3 See TORT vol 97 (2010) PARA 622.

4 See TORT vol 97 (2010) PARA 621. When a confidence has been committed to writing or print, trespass to goods or conversion may be invoked if the material is dealt with tortiously: see para 407 post.

5 See *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337; and TORT vol 45(2) (Reissue) PARA 548 et seq.

For authorities on the question whether there is a proprietary right in information see para 407 notes 7-8 post. An independent tort would supplement jurisdiction available in equity and property to restrain or remedy abuse of confidence by parties not privy to a contractual obligation of confidence.

The creation of a new tort of breach of confidence has been proposed but the proposal has not been given effect: see *Breach of Confidence* (Law Com no 110) (Cmnd 8388) (1981) para 2.10; North 'Breach of Confidence: is there a new Tort?' (1971) 12 JS PTL 149; Jones 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463. There have been occasional references to the 'tort of breach of confidence' but these may not have been fully considered: see *Douglas v Hello! Ltd* [2001] QB 967 at [117] and [123], [2001] 2 All ER 289 at [117] and [123]; *Venables v News Group Newspapers Ltd* [2001] Fam 430 at [30] and [44], [2001] 1 All ER 908 at [30] and [44]; *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373 at [69], [2003] QB 633 at [69], [2003] 1 All ER 224 at [69].

7 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48; *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 380 ('reasonable man' test used to determine whether defendant ought to have known of confidentiality).

8 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA (analogy with conversion); distinguished in *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418, [1986] 1 WLR 1419.

9 *Initial Services Ltd v Putterill* [1968] 1 QB 396, [1967] 3 All ER 145, CA; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; cf *Khashoggi v Smith* (1980) 124 Sol Jo 149, CA; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA. See, however, para 500 post.

10 *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765 at 777-778, CA, per Evans LJ.

11 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8(1); *Wainwright v Home Office* [2001] EWCA Civ 2081 at [57], [2002] QB 1334 at [57], [2002] 3 WLR 405 at [57]; and *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] NLJR 595. As to the Convention generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 122 et seq. As to the right to personal privacy generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 110. As to the interaction between the Human Rights Act 1998 and the law of confidence see paras 418, 433 post. See also *Martin v McGuiness* (2003) Times, 21 April, OH (evidence for a civil trial gathered by a private investigator in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms art 8(1) may be admissible under art 8(2) if the surveillance methods used were reasonable and proportionate and necessary to protect the assets of the defender and his right to a fair trial).

UPDATE

405 Tort

NOTE 6--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/406. Equity.

406. Equity.

It is well established that there is jurisdiction in equity to protect confidence¹. This may be invoked when: (1) a party receives information known to be confidential under an agreement not having contractual force²; or (2) when a third party receives information which is the subject of an agreement or contract creating an obligation of confidence, having induced a party to the contract or agreement to act in breach of the obligation³; or (3) when information is received without inducement but when the recipient knows or ought to know that it is being imparted in breach of confidence⁴; or (4) when the information is initially received innocently but the recipient later becomes aware that it was imparted in breach of confidence⁵. In exceptional circumstances, the court has jurisdiction in equity to extend the protection of confidentiality of information where disclosure would put at risk the physical safety of individuals⁶.

The equitable jurisdiction is broader than that in contract in that it does not require a binding contractual agreement or consideration⁷ and is not subject to the requirements of privity⁸. It is wider than the tort of inducing breach of contract since it does not require the intentional inducement of a breach of contract⁹.

Remedies may be more restricted in that common law damages may not be available¹⁰. The appropriate remedies for a claim in equity will be any or all of the following: (a) an injunction¹¹; (b) an account of profits¹²; (c) an order for the delivery up or destruction of offending material¹³. Where the Court of Appeal or High Court has jurisdiction to entertain an application for an injunction or specific performance¹⁴, it may award damages in addition to, or in substitution for, an injunction¹⁵. It is not settled whether equitable compensation is available for breach of an equitable obligation of confidence¹⁶.

1 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255, 268, 281-282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 639-640, 648-649, 658-659, HL; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 352-353, 359-360, [1987] 1 WLR 1248 at 1293, 1302, HL; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n, 65 RPC 203, CA; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *Auto Securities Ltd v Standard Telephones and Cable Co* [1965] RPC 92 at 93; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023; *Baker v Gibbons* [1972] 2 All ER 759, [1972] 1 WLR 693; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 All ER 1222, [1973] 1 WLR 1126, PC; *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202, CA; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477; *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765, CA.

2 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923 (pre-contractual negotiations).

3 *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498 at 503-504 (injunction granted against procuring any person to act 'in breach of any contractual or other obligation of confidence'); and see the cases cited in para 405 note 1 ante. See also *Thomas v Pearce* [2000] FSR 718, CA (before fixing a new employer with assisting an employee in breach of confidence in relation to his or her previous employer, the test given in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC (see TRUSTS vol 48 (2007 Reissue) para 704) must be satisfied, since an awareness of the confidential nature of the information, or a willingness to turn a blind eye, is required rather than mere careless, naïve or stupid behaviour). As to liability

for a breach of trust see further *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 1 All ER 97, [2002] 3 WLR 1913.

4 *Prince Albert v Strange* (1849) 2 De G & Sm 652 at 714; *London and Provincial Sporting News Agency Ltd v Levy* (1928) [1923-1928] MacG Cop Cas 340.

5 See para 422 text and notes 7-8 post.

6 *Venables v News Group Newspapers Ltd* [2001] Fam 430, [2001] 1 All ER 908 (information regarding the identity and location of notorious killers required special protection after their release); *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] All ER (D) 282 (May). See also *Toussaint v Mattis* (22 May 2000) Lexis, CA (if disclosure of the name of a third party would involve great risk to his personal safety and prejudice the claimant's business, disclosure should be ordered only if it is necessary to do justice between the parties).

7 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.

8 See the cases cited in para 422 text and notes 7-8 post. As to the doctrine of privity generally, and the exceptions to it allowed by common law, equity and statute (eg the Contracts (Rights of Third Parties) Act 1999), see CONTRACT vol 9(1) (Reissue) para 748 et seq.

9 See the cases cited in para 405 note 1 ante.

10 *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 213-214, CA.

11 See paras 492-493 post; and CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

12 See para 497 post; and EQUITY. See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL; and para 404 note 6 ante.

13 See para 495 post; and EQUITY.

14 See generally SPECIFIC PERFORMANCE.

15 See the Supreme Court Act 1981 s 50 (which is derived from the Chancery Amendment Act 1858 (Lord Cairns' Act) s 2); and DAMAGES vol 12(1) (Reissue) para 825. Damages in lieu are an alternative to an account and because of difficulties attendant on that remedy are often preferred in commercial cases: see *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 286, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662, HL, per Lord Goff of Chieveley. See further para 496 post.

16 The following New Zealand cases support the remedy: *Coleman v Myers* [1977] 2 NZLR 225 at 359-363, 379, NZ CA; *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 at 525, NZ CA; *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 at 361, NZ CA; *Day v Mead* [1987] 2 NZLR 443 at 450-451, 460-462, 467, 469, NZ CA; *A-G for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 172, NZ CA; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, NZ CA. See also the Canadian case of *Cadbury Schweppes inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577, [2000] FSR 491, Can SC (the objective in a breach of confidence case is to restore the confider to as good a position as if the breach had not occurred, the actual loss being assessed with the full benefit of hindsight).

UPDATE

406 Equity

NOTE 15--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/407. Property.

407. Property.

If a confidence is embodied in printed or written material, the torts of trespass to goods¹ or conversion (trover)² may be available if the material is improperly acquired or exploited³. Damages may reflect the value of the information in question⁴. Conversion would permit an action against a party who improperly acquired or interfered with the embodying material in good faith in such a manner as to exclude the party entitled to possession from use and possession of the material; trespass would give an action against one who merely interfered with possession of the material⁵. These options facilitate actions against parties who are not privy to the original confidential relationship and, unlike the equitable jurisdiction, do not depend on the defendant's knowledge of an infringement of confidence. The torts of conversion and trespass to goods do depend on an interference with tangible chattels but, whether or not the confidence has been put in written form, it may be possible to rely on a restricted proprietary right in the information itself. This might be confined to trade secrets and literary, dramatic and artistic works, differing from copyright in protecting substance as well as form, and from patents in not giving a monopoly, the information remaining available for discovery by research or analysis of products⁶. There is conflicting authority as to whether there may be property in confidential material⁷ or whether, more accurately, in the process of protecting it, the courts have allowed it certain proprietary characteristics⁸. Proprietary protection would supplement equitable protection of confidence by providing an action against a person who improperly acquired confidential information without having notice of or being party to a confidential relationship with the person entitled to the information. There is little, if any, indication that the courts would take the analogy with other forms of property so far as to apply the *nemo dat* rule⁹ and its exceptions to information. On the other hand there is some support for the view that the court will favour an analogy between an entrustment of confidential information and a bailment¹⁰. This analogy would at least have the advantage of permitting the imposition of liability for negligent misuse or disclosure¹¹.

1 As to trespass to goods see generally TORT vol 45(2) (Reissue) PARA 659 et seq.

2 As to conversion of goods see generally TORT vol 45(2) (Reissue) PARA 548 et seq.

3 *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337; *Thurston v Charles* (1905) 21 TLR 659.

4 *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337; *Bavins Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA (non-negotiable instrument); *Building and Civil Engineering Holiday Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA. As to the entrustment of confidential information as a bailment see paras 408, 463 post.

5 As to wrongful interference with goods see *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 at [39], [103], [2002] 2 AC 883 at [39], [103], [2002] 3 All ER 209 at [39], [103] per Lord Nicholls of Birkenhead; and TORT vol 45(2) (Reissue) PARA 542 et seq.

6 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101 (substance of orally imparted idea); *James v James* (1872) LR 13 Eq 421 at 424 (independent discovery); *Estcourt v Estcourt Hop Essence Co* (1875) 10 Ch App 276; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n at 414, 65 RPC 203 at 215, CA (analysis or dismantling of products publicly available). Subconscious copying will amount to breach: *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.

7 The following dicta recognise property in information: *Prince Albert v Strange* (1849) 1 Mac & G 25 at 42-43; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QB 147, CA; *Exchange Telegraph Co Ltd v Howard* (1906) 22 TLR 375; *Dean v Macdowell* (1878) 8 ChD 345 at 354; *Aas v Benham* [1891] 2 Ch 244 at 255, CA; *Scott v Scott* [1913] AC 417 at 443, 450, 483; *Herbert Morris Ltd v Saxeby* [1916] 1 AC 688 at 714, HL; *Re Keene* [1922] 2 Ch 475; *Evans Medical Supplies Ltd v Moriarty (Inspector of Taxes)* [1957] 1 All ER 336, [1957] 1 WLR 288; *Rolls-Royce Ltd v Jeffrey* [1962] 1 All ER 801 at 805, [1962] 1 WLR 425 at 430, HL; *Musker v English Electric Co Ltd* (1964) 41 TC 556; *Boardman v Phipps* [1967] 2 AC 46 at 89-91, 107-111, 115-116, [1966] 3 All ER 721 at 734-735, 745-748, 751, HL; *Technograph Printed Circuits Ltd v Chalwyn Ltd* [1967] RPC 339 at 344; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 320, [1965] 1 All ER 611; *Butler v Board of Trade* [1971] Ch 680 at 691, [1970] 3 All ER 593 at 600; *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675 at 676; *Yates Circuit Foil Co Ltd v Electrofoils Ltd* [1976] FSR 345 at 384-385; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 327-328, [1987] 1 WLR 1248 at 1263 per Browne-Wilkinson V-C; *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of*

Community Services (1990) 99 ALR 679, Aust Fed Ct; *Breen v Williams* (1996) 138 ALR 259; *R v Mid Glamorgan Family Health Services Authority, ex p Martin* [1995] 1 WLR 110 at 119, CA, per Sir Roger Parker (absolute property rights in information given to doctors by patients qualified by obligations of confidence); *Murray v Yorkshire Fund Managers Ltd* [1998] 2 All ER 1015 at 1023, [1998] 1 WLR 951 at 959, CA. A trade secret has been held to be trust property (*Green v Folgham* (1823) 1 Sim & St 398), sold with a business (*Bryson v Whitehead* (1822) 1 Sim & St 74), passed to a trustee in bankruptcy (*Re Keene* [1922] 2 Ch 475), left by will (*Canham v Jones* (1813) 2 Ves & B 218), treated as partnership property (*Dean v MacDowell* (1878) 8 ChD 345) and passed to a successor in title (*Ibcos Computers v Barclays Mercantile Highland Finance* [1994] FSR 275).

8 Dicta denying or doubting property in information are to be found in the following: *Butterworth (Inspector of Taxes) v Page* (1935) 153 LT 34 at 43, HL; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 209, CA; *Fraser v Evans* [1969] 1 QB 349 at 361, [1969] 1 All ER 8 at 11; *Boardman v Phipps* [1967] 2 AC 46 at 127-128, [1966] 3 All ER 721 at 759, HL, per Lord Upjohn ('In general, information is not property at all ... information is not property in any normal sense'); *North and South Trust v Berkeley* [1971] 1 All ER 980 at 993, [1971] 1 WLR 470 at 485; *Oxford v Moss* (1978) 68 Cr App Rep 183 (information not property for the purposes of theft); *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] 1 All ER 786, CA (a patient has no property rights to his prescription or to the information contained therein).

The question of whether confidential information may be regarded as property was deliberately left open in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281, [1988] 3 All ER 545 at 659, HL, per Lord Goff of Chieveley. However, a decision of the Supreme Court in Canada has decisively rejected the characterisation of confidential information as property where it was felt that this would not assist the court in giving an appropriate remedy, taking into account the facts of the particular case, the nature of the interest being protected, and the policy objectives underlying the cause of action: *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577, [2000] FSR 491, Can SC.

9 *le nemo dat quod non habet* (no one can give what he does not have).

10 See *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 101; *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311, NZ CA; *Gartside v Outram* (1856) 26 LJCh 113; *Foster v Mountford* [1978] FSR 582; *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 534; and paras 408, 463 post.

11 Such liability may be indicated by liability for subconscious copying: see *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/408. Bailment.

408. Bailment.

Bailment is traditionally confined to the entrustment of tangible chattels¹. Obligations of confidentiality can arise where the bailment of a chattel is accompanied by an entrustment of confidential information relating to that chattel or its market, or where the recipient can derive confidential information from the chattel itself. This can occur where a temporary delivery of goods (such as industrial prototypes, patterns, drawings or specifications) is made in order to facilitate industrial or commercial processes², or where goods which are the subject of litigation are bailed for analysis or report³. In such a case, where a bailment co-exists with some other relationship imposing a duty of confidentiality, an action to restrain or repair the misuse of the information can be founded on the bailment as well as on the contract or other general ground of confidence⁴.

An entrustment of confidential and intangible material may, however, be treated as a bailment of information, creating rights and duties akin to those which arise under a true bailment⁵; this is on the basis that confidential information can be property⁶. There is no direct authority that information may be the subject of a bailment, but there are decisions which appear to favour an analogy between bailment and the entrustment of information, or which use the language of bailment in describing such entrustment⁷. If the analogy is accepted, a person to whom confidential information is entrusted can be restrained, by means of remedies akin to those arising on a bailment, from dealing with the information contrary to the terms of the

entrustment⁸, and monetary remedies can be awarded in similar fashion to those which issue in respect of interference with chattels⁹.

However, there are judicial observations denying an equation between bailments and entrustments of information¹⁰; there is no modern English decision on the question¹¹.

1 As to bailment generally see BAILMENT. As to bailees' obligations of confidence see para 463 post.

2 See *Suhner & Co AG v Transradio Ltd* [1967] RPC 329 at 336 (claimants' drawings wrongfully used by defendants to prepare their own manufacturing drawings); *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311, NZ CA (use of dyes in return for royalties); *Sir Robert McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397 at 422 per Thesiger J (bailee under duty to deliver report on defective fire extinguisher to the bailors as a benefit derived from their use of the subject of the bailment); *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337, BC SC. The agreement must be examined closely to determine whether there is an original bailment: cf *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 534-535, Aust HC, per Latham CJ (money payable under agreement not derived from property of licensors where agreement required return of aircraft specifications and drawings but lacked provision stating that the material remained the licensor's property).

3 Cf *Sir Robert McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397 at 422 per Thesiger J.

4 See further paras 403-407 ante.

5 See Kohler and Palmer 'Information as Property' in Palmer & McKendrick *Interests in Goods* (1998, 2nd Edn) pp 3-24; Palmer on Bailment (2nd Edn, 1991) pp 13-15.

6 See para 407 ante. 'It is by no means clear that information is property in this context': *North and South Trust Co v Berkeley* [1971] 1 All ER 980 at 993, [1971] 1 WLR 470 at 485 per Donaldson J.

7 *Gartside v Outram* (1856) 26 LJCh 113 at 116 per Wood V-C (employer's communication of business secrets to employee constitutes 'a solemn and sacred deposit'); *North and South Trust Co v Berkeley* [1971] 1 All ER 980 at 993, [1971] 1 WLR 470 at 485 per Donaldson J (if information entrusted to Lloyd's brokers were property, such property was not acquired by the brokers so as to enable acquisition by their principals, but was 'merely in their custody'); *Reading v R* [1949] 2 KB 232 at 236, CA, per Asquith LJ (affd sub nom *Reading v A-G* [1951] AC 507 at 516, HL, per Lord Porter) (fiduciary relationship can arise giving rise to fiduciary obligations in the recipient, where one party entrusts to another property 'including intangible property as, for instance, confidential information' on terms restricting its use); *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 70, Aust HC, per Gibb CJ; *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315, NZ CA, per Cooke P. See further *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 547-548 per Williams J; but cf at 534-536 per Latham CJ.

The analogy derives support from judicial observations in Commonwealth cases that duties akin to those owed by a bailee can arise from an entrustment of other forms of intangible property, such as goodwill: see eg *Hospital Products Ltd v United States Surgical Corp* supra at 101, 105-106 per Mason J; *Watson v Dolmark Industries Ltd* supra at 315 per Cooke P.

8 *Reading v R* [1949] 2 KB 232 at 236, CA, per Asquith LJ (affd sub nom *Reading v A-G* [1951] AC 507 at 516, HL, per Lord Porter); *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315, NZ CA, per Cooke P, and at 318 per Gault J. An alleged bailee must have some awareness of, or at least some means of gaining an awareness of, the interest of the party alleged to be the bailor: *Marcq v Christie Manson and Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731, (2003) Times, 30 May.

9 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA (damages awarded for misuse of confidential information on similar basis to damages for conversion); cf *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315, NZ CA. See also generally paras 496-497 post.

10 *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 534-535, Aust HC, per Latham CJ; cf at 546-548 per Williams J.

11 See note 6 supra.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(2) DERIVATION OF JURISDICTION/409. Legislation.

409. Legislation.

Statute or subordinate legislation may impose obligations of confidence or negate obligations which might otherwise have arisen. Legislation prohibiting publication includes such disparate topics as national security¹ and aspects of medical confidentiality² and such specialised topics as interception of communications³, insider dealing⁴ and data protection⁵. Examples of negation include: enabling the breach of contractual duties of confidentiality between employer and employee where the public interest might demand it⁶; the requirements of the Companies Act 1985 in respect of publication of balance sheets, profit and loss accounts and directors' and auditors' reports⁷; and the disclosures required by rules of civil procedure⁸ and under search orders⁹. Disclosure in a particular case may, by statute or subordinate legislation, be a criminal offence, but since criminal law can be enforced by injunction this provides a link with civil obligations of confidence¹⁰ and on occasion statute may provide for a direct private action for damages¹¹.

Legislation may also provide for existing duties of confidentiality to be preserved¹².

1 See the Official Secrets Acts 1911 to 1989; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 478 et seq.

2 See paras 446 et seq, 577-578 post.

3 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 506 et seq.

4 See FINANCIAL SERVICES AND INSTITUTIONS.

5 See para 503 et seq post.

6 See the Public Interest Disclosure Act 1998; para 432 post; and EMPLOYMENT vol 39 (2009) PARAS 56-57.

7 See the Companies Act 1985 Pt VII Ch I (ss 221-245C) (as amended).

8 See CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

9 Search orders were formerly called 'Anton Piller orders', following *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA. See CIVIL PROCEDURE vol 11 (2009) PARA 402 et seq.

10 See *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; and CIVIL PROCEDURE vol 11 (2009) PARA 492.

11 See *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 412, 416, [1984] 1 WLR 892 at 896, 901, CA. As to when the claimant has a special interest over and above that of the general public and the statute does not contemplate exclusive enforcement by criminal law see *Gouriet v Union of Post Office Workers* [1978] AC 435, [1977] 3 All ER 70, HL. In imposing a duty statute may contemplate reasonable disclosure, thus providing a defence: *Hoechst UK Ltd v Chemiculture Ltd* [1993] FSR 270.

12 See the Data Protection Act 1998 s 7(6)(a) (see para 525 note 7 post), s 8(5) (in relation to trade secrets: see para 524 note 7 post); and the Freedom of Information Act 2000 s 41(1)(b) (see para 602 post).

UPDATE

409 Legislation

NOTE 7--Companies Act 1985 replaced for the most part by Companies Act 2006. As to accounts and reports see now Companies Act 2006 Pt 15 (ss 380-474); and COMPANIES vol 15 (2009) PARA 693 et seq.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE/410. Essential features of confidentiality.

(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE

410. Essential features of confidentiality.

The material for which protection is claimed must be: (1) of limited public availability¹; and (2) of a specific character², capable of clear definition. It need not be original or novel³, complex⁴, commercially valuable⁵, personally damaging or discreditable to the confider⁶ nor, in general, need it take any specific form⁷; but if it does not possess the two basic characteristics of limited availability and specific character it will not be protected even though it is expressly described as confidential⁸. In a marginal case such a description could be crucial⁹.

1 See *A-G v Observer Ltd, AG v Times Newspapers Ltd* [1990] 1 AC 109 at 215, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 624, CA, per Bingham LJ, where the term 'inaccessibility' was adopted; affd [1990] 1 AC 109, [1988] 3 All ER 545, HL. See also para 411 post.

2 See para 412 post.

3 See para 414 post.

4 See para 414 post.

5 See para 413 post.

6 See para 415 post.

7 See para 417 post.

8 *Re Dalrymple's Application* [1957] RPC 449; *Mainmet Holdings plc v Austin* [1991] FSR 538.

9 *Sun Printers Ltd v Westminster Press Ltd* (1982) 126 Sol Jo 260, CA, per Donaldson LJ.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE/411. Limited availability.

411. Limited availability.

For material to be protected as confidential its availability to the public must be restricted¹, but the question is one of degree and the restrictions need not be narrow². If information is assembled and communicated to recipients subject to an agreement or understanding that it is for their use alone, even if all the component items are available to the public the fact that others would have to expend time, work or money marshalling them in the form in which they were communicated may establish the necessary restriction on availability³. If information is not widely available in this country but is available elsewhere and it is common practice for those interested in the topic to consult the foreign sources then it may not be protected here,

although much will depend on the degree of availability⁴. If information is published only in part, confidence may still protect the part which is undisclosed⁵. The offering for sale of a product embodying confidential information will not of itself destroy the confidence even though the relevant information could be discovered by analysing the product⁶; if the effort and expense of analysis can be avoided or reduced by revealing the information it will retain protection, but in time it may become so generally known that protection will be lost⁷. If material was once public but its significance was not generally appreciated, or it was ignored, or forgotten, it may become confidential⁸. Where persons are required to disclose documents by rules of procedure, they are entitled to the protection of the court against any use of the documents for any purpose other than in the action for which they were disclosed⁹. A duty to preserve confidentiality may well not be eroded or terminated by adventitious publicity¹⁰.

1 *Robb v Green* [1895] 2 QB 1 at 18-19; *Louis v Smellie* (1895) 73 LT 226; *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48 at 53; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429 at 431-432; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 (on appeal (but the appeal reported first) [1960] RPC 128, CA); *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498; *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at 1034, [1977] 1 WLR 1472 at 1480, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 (a list of individual, publicly available design features relating to contact lenses, as opposed to novel combinations of those features, was not confidential).

2 *Prince Albert v Strange* (1849) 1 Mac & G 25 (printers); *Gilbert v Star Newspaper Ltd* (1894) 11 TLR 4 (theatrical cast); *BO Morris v F Gilman (BST) Ltd* (1943) 60 RPC 20 (workers on machine); *Franchi v Franchi* [1967] RPC 149 at 153 (foreign patent too widely known); *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (wide knowledge defeats even government confidentiality in security matters). In employment contexts the fact that the employer has not sought to restrict knowledge or to give instructions as to restraint will go to defeat confidentiality: *United Indigo Chemical Co Ltd v Robinson* (1932) 49 RPC 178; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; *E Worsley & Co Ltd v Cooper* [1939] 1 All ER 290 at 309; *Sun Printers Ltd v Westminster Press Ltd* (1982) 126 Sol Jo 260, CA.

3 *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48 (racing results); *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97 at 104 (making and selling plastic swizzle sticks did not amount to a publication defeating confidentiality 'if work would have to be done' to make information available).

4 *Franchi v Franchi* [1967] RPC 149 (foreign patent too well known in this country).

5 *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL.

6 Cf *Alfa Laval Cheese Systems Ltd v Wincanton Engineering Ltd* [1990] FSR 583 at 592 per Morrit J (ownership of a product bought on the open market includes an entitlement to the owner 'to dismantle the machine to find out how it works and tell anyone he pleases', provided that he does not infringe intellectual property rights vested in others or contractual terms binding on him); and *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138 (where the information contained within a product which is available on the open market is encrypted, that fact alone does not make the information confidential and the act of decryption does not necessarily mean that the decrypted information is thereby received in confidence).

7 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97 at 104; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; and see *Yates Circuit Foil Co Ltd v Electrofoils Ltd* [1976] FSR 345. If others are prepared to pay for the information this may show that it is not generally available: *Potters-Ballotini v Weston-Baker* [1977] RPC 202 at 206, CA.

8 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

9 *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] QB 613, [1975] 1 All ER 41. As to disclosure generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

10 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 28, [1981] 2 All ER 321 at 339, CA.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE/412. Specific character.

412. Specific character.

For material to be protected as confidential it must be possible to point to a definite body of material or source of information¹. The material must not be so intermingled with material publicly available that it is impossible to indicate its limits². This has been stressed by the courts in relation to injunctions which must be so drafted as to leave the party enjoined in no doubt as to what is forbidden³.

1 *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 at 391 (on appeal (but the appeal reported first) [1960] RPC 128, CA); *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, [1989] ICR 123; *Maudsley v Palumbo* [1995] TLR 690.

2 *Amway Corp v Eurway International Ltd* [1974] RPC 82; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 138, [1986] 1 All ER 617, CA.

3 *Amway Corp v Eurway International Ltd* [1974] RPC 82 at 85-86; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 104, 109, CA; *Woodward v Hutchins* [1977] 2 All ER 751 at 754, [1977] 1 WLR 760 at 764, CA; *Bjorlow (Great Britain) Ltd v Minter* (1954) 71 RPC 321 at 322-323; *PA Thomas & Co v Mould* [1968] 2 QB 913 at 922-923; *Suhner & Co AG v Transradio Ltd* [1967] RPC 329 at 334.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE/413. Value.

413. Value.

No protection will be given to material which is 'perfectly useless'¹, 'pernicious nonsense'² or 'trivial tittle-tattle'³. While the absence of current commercial value will not of itself debar protection it will affect the quantum of damages or the exercise of discretion in granting an injunction⁴. These factors may also apply to the protection of personal, domestic and matrimonial confidences⁵. An idea communicated in confidence but not in writing must have potential commercial merit to be protected⁶.

1 *McNicol v Sportsman's Book Stores* (1930) [1928-1935] MacG Cop Cas 116, cited in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 149, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 574 per Scott J (affd [1990] 1 AC 109, [1988] 3 All ER 545, HL).

2 *Church of Scientology of California v Kaufman* [1973] RPC 635.

3 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48.

4 *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272 at 273; affd [1957] RPC 207, CA.

5 *Stephens v Avery* [1988] Ch 449 at 454, [1988] 2 All ER 477 at 481 (information as to sexual conduct not necessarily 'trivial' tittle-tattle and can be protected unless relating to conduct which is grossly immoral). See also *M and N v MacKenzie and News Group Newspapers Ltd* (18 January 1988, unreported) (cited in *Stephens v Avery* [1988] Ch 449 at 456, [1988] 2 All ER 477 at 482-483); *Khashoggi v Smith* (1980) 124 Sol Jo 149.

6 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(3) GENERAL REQUIREMENTS OF PROTECTED CONFIDENCE/414. Simplicity, originality and novelty.

414. Simplicity, originality and novelty.

The fact that confidential material is simple will not restrict its claim to protection; in fact it may enhance it¹.

In general, protected material need not be novel or original², but these characteristics may be evidence going to show that it is not publicly available³. Originality may be essential if an idea not reduced to writing is to be protected⁴.

1 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289 at 295, [1965] 1 WLR 1293 at 1310; *Under Water Welders & Repairers Ltd v Street and Longthorne* [1968] RPC 498 at 506.

2 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n at 414, 65 RPC 203 at 215-216, CA; and see *House of Spring Gardens Ltd v Point Blank Ltd* [1983] FSR 213 (Ireland) (on appeal [1985] FSR 327).

3 As to availability see para 411 ante.

4 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(4) LIMITS OF CONFIDENCE/415. Protective scope of an obligation of confidence.

(4) LIMITS OF CONFIDENCE

415. Protective scope of an obligation of confidence.

The obligation of confidence will bind the confidant whether or not the information covered by it would be to the credit of the creator¹, and whether or not it is of current economic value in commercial matters²; but it will not protect illegality, gross immorality or conduct contrary to public policy³.

1 *Prince Albert v Strange* (1849) 2 De G & Sm 652 at 697 (recreational art); *Pollard v Photographic Co* (1888) 40 ChD 345 (public display of portrait photograph a 'gross breach of faith'). 'The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure': *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, HL, per Lord Keith of Kinkel.

2 *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272 at 273; affd [1957] RPC 207, CA.

3 See para 416 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(4) LIMITS OF CONFIDENCE/416. Illegality, immorality and public policy.

416. Illegality, immorality and public policy.

The confidentiality of information concerning misconduct or iniquity which in the public interest ought to be disclosed will not be protected¹. This applies to matters relating to past and contemplated crime², health risks to the public³, the reliability of equipment used by the police for evidential purposes⁴, matters within the purview of the Inland Revenue or of regulatory bodies⁵ or public inquiries set up to investigate the efficiency of public bodies or institutions⁶. The interests of justice may require disclosure in these circumstances⁷.

There is authority that past, as distinct from contemplated, civil wrongs can be protected by confidence, since disclosure of past torts may revive old disputes and so not be for the public good⁸. The court may prohibit, or decline to prohibit, contemplated *prima facie* defamatory breaches of confidence even though the defendant intends to justify the alleged defamation⁹. There may be disclosure to correct words or conduct amounting to misrepresentations misleading the public¹⁰. The disclosure of misconduct or conduct detrimental to the public will be justified¹¹, but possible benefit to the public from the disclosure of a scientific discovery or invention covered by confidence will not¹². Negligence or incompetence (as distinct from misconduct) will not justify disclosure¹³. Well-founded suspicion of misconduct as well as knowledge of wrongdoing will justify disclosure¹⁴. Doctors, bankers and other professional practitioners are subject to requirements of disclosure peculiar to their professions¹⁵.

1 *Gartside v Outram* (1856) 26 LJCh 113; *Initial Services Ltd v Putterill* [1968] 1 QB 396, [1967] 3 All ER 145; *Khashoggi v Smith* (1980) 124 Sol Jo 149, CA; *British Steel Corp v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA; *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. See also *Fraser v Evans* [1969] 1 QB 349 at 362, [1969] 1 All ER 8 at 11-12, CA, per Lord Denning MR (no injunction against newspaper which failed to make out ground of iniquity but nevertheless intended to plead justification of alleged prospective breach of copyright; see also text and note 9 *infra*).

2 *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA (approved in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1169, 1201, [1981] 1 All ER 417 at 455, 479, HL); *Weld-Blundell v Stephens* [1919] 1 KB 520 at 527, 533, CA; *Tournier v National Provincial Bank Ltd* [1924] 1 KB 461 at 468, 473, 481, CA; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260; *Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 All ER 620; *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659, HL, per Lord Goff of Chieveley (only limited disclosure may be allowed as being in the public interest in a case of alleged iniquity in the security services).

3 *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023, CA; *Church of Scientology of California v Kaufman* [1973] RPC 635; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260. The defence will not apply if the damage has ceased: *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] QB 613, [1975] 1 All ER 41.

4 *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA.

5 *Re a company's application* [1989] Ch 477, [1989] 2 All ER 248. See also *A v A (ancillary relief), B v B* [2000] 1 FLR 701 (the public interest in seeing that taxes are paid and evaders of tax convicted overrides the confidentiality of material disclosed in ancillary relief proceedings).

6 *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, (1991) Times, 30 October.

7 *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA. The interests of justice may dictate that the disclosure of confidential information is ordered also where illegality is set up as a defence in a civil action, but only if the information is relevant to issues which need to be tried, and with due regard paid to the interests of parties to the action and of third parties who would be affected by the disclosure: *Toussaint v Mattis* (22 May 2000) Lexis, CA.

8 See *Weld-Blundell v Stephens* [1919] 1 KB 520 at 527-529, 533-535, CA; not fully considered on appeal [1920] AC 956 at 993, 1000, HL; disapproved in *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA, per Lord Denning MR. Dictum approved in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1169, 1201, [1981] 1 All ER 417 at 455, 480, HL. See also *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260; *Malone v Metropolitan Police Comr* [1979] Ch 344 at 361, [1979] 2 All ER 620 at 634-635.

9 *Fraser v Evans* [1969] 1 QB 349 at 361-362, [1969] 1 All ER 8 at 11-12, CA. See also LIBEL AND SLANDER vol 28 (Reissue) para 8. See, however, the text and note 1 supra. As to justification as a defence to defamation see LIBEL AND SLANDER vol 28 (Reissue) para 82 et seq.

10 *Church of Scientology of California v Kaufman* [1973] RPC 635; *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 407, 410-411, [1967] 3 All ER 145 at 149, 151-152, CA; *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA.

11 Whilst material of a grossly immoral tendency may not be protected, in the absence of a generally accepted moral code it is difficult to identify such material: *Stephens v Avery* [1988] Ch 449 at 453, [1988] 2 All ER 477 at 480. But see *M and N v MacKenzie and News Group Newspapers Ltd* (18 January 1988, unreported), cited in *Stephens v Avery* supra at 456 and at 482-483.

12 *Church of Scientology of California v Kaufman* [1973] RPC 635 at 649; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260. However, prevention of impending disaster may excuse disclosure: *Malone v Metropolitan Police Comr* [1979] Ch 344 at 362, [1979] 2 All ER 620 at 635.

13 See *British Steel Corp v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL; *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] QB 613 at 622, [1975] 1 All ER 41 at 49-50.

14 *Gartside v Outram* (1856) 26 LJCh 113 at 114; *Butler v Board of Trade* [1971] Ch 680 at 689, [1970] 3 All ER 593 at 598; *Malone v Metropolitan Police Comr* [1979] Ch 344 at 377, [1979] 2 All ER 620 at 646.

15 See para 439 et seq post. See, however, *A Health Authority v X* [2001] EWCA Civ 2014, [2002] 2 All ER 780 (there is a high public interest in seeing that professional disciplinary hearings for medical malpractice are properly administered, and this could outweigh the confidentiality of patient records that are inextricably linked with the case papers); *Pharaon v Bank of Credit and Commerce International SA (in liquidation)* [1998] 4 All ER 455 (the public interest in seeing justice done in a United States court, where international bank fraud is being alleged, outweighed the public interest in maintaining bank and customer confidentiality in documents, which accordingly could be disclosed to a party in the foreign litigation).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(4) LIMITS OF CONFIDENCE/417. Form.

417. Form.

In general neither the obligation of confidentiality nor the subject matter need be in any special form.

The obligation may be written¹ or oral². It may be specifically agreed³, expressly or impliedly⁴, or may arise as a necessary or traditional incident of a relationship such as marriage⁵ or professional employment⁶. An express contractual term will not necessarily exclude or restrict a wider implied term; nor, conversely, will an unreasonably wide express term prevent the enforcement of a similar, but less restrictive, implied term⁷.

The subject matter may be oral⁸, written⁹ or graphic as when confidence attaches to etchings prepared for private circulation amongst friends¹⁰. It may take the form of tables¹¹, diagrams¹²,

formulae¹³, maps and plans¹⁴, personal correspondence¹⁵, or plots and ideas for dramatic works¹⁶. It may be embodied in machinery or its products¹⁷.

A photograph, taken without authority and showing someone engaged in a private act, has the potential to constitute a breach of confidence¹⁸. This potential may be realised where the breach is considered to be particularly intrusive¹⁹, but the position is less clear when the photographed event takes place in public²⁰ or where the photography is part and parcel of a journalistic package whose publication is justified in the public interest²¹. The unauthorised disclosure of a photograph, commissioned for personal use, could breach either an implied contract or an implied undertaking of confidence²².

The subject matter of the confidence may be carried in the memory²³. An ex-employee is not necessarily free to use in his new employment all the material he carried in his memory from his former employment²⁴. An idea not reduced into writing but communicated in confidence will be protected provided that it is original, clearly identifiable, has potential commercial merit and is capable of reaching fruition²⁵.

The fact that material claimed to be confidential is not easily separable from other material does not preclude the enforcement of confidentiality, but if the allegedly confidential material is part of a package which also contains non-confidential material this may go to show that the material in dispute is not confidential²⁶.

1 *Litholite Ltd v Travis and Insulators Ltd* (1913) 30 RPC 266; *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202, CA.

2 *Portal v Hine* (1887) 4 TLR 330; *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

3 *Portal v Hine* (1887) 4 TLR 330; *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477 (non-contractual understanding without any prior relationship is enough).

4 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA (contractual negotiations).

5 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611 (marriage).

6 *Tournier v National Provincial Bank* [1924] 1 KB 461, CA (banker and customer); *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414, DC (doctor and patient).

7 *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8; and see para 404 ante.

8 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

9 *Thompson v Stanhope* (1774) Amb 737 (family letters).

10 *Prince Albert v Strange* (1849) 1 Mac & G 25.

11 *Merryweather v Moore* [1892] 2 Ch 518 (table of engineering specifications).

12 *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA (diagrams of pig-feeding machine).

13 *Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc* [1989] FSR 135, CA (formulae for ink manufacture); *Alperton Rubber Co Ltd v Manning* (1917) 86 LJCh 377.

14 *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429 (drawings of tank trucks); *Floyd v Cheney* [1970] Ch 602, [1970] 1 All ER 446.

15 *Thompson v Stanhope* (1774) Amb 737.

16 *Gilbert v Star Newspaper Ltd* (1894) 11 TLR 4 (plot of a comic opera); *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101; *Talbot v General Television Pty Ltd* [1981] RPC 1 (Vict) (idea for television programme).

17 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97 (machine for making plastic swizzle sticks); *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275 (computer software).

18 This line of authority is founded on *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807, [1995] 4 All ER 473 at 476 per Laws J.

19 *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 398 (injunction allowed to prevent publication of photographs of a celebrity's visit to a brothel). This approach has succeeded also where an express or implied prohibition of photography in relation to private property has been found: *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 (illicit photographs taken of an album cover photo-shoot prior to the album's release); *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 (illicit photographs taken of a film costume prior to the film's release). See also *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] NLJR 595 (photographic representation of the wedding of two celebrities had the necessary quality of confidence about it).

20 See *R v Broadcasting Standards Commission, ex p British Broadcasting Corp* [2001] QB 885, [2000] 3 All ER 989, CA (considering the position under the Broadcasting Act 1996, the court found that secret filming of someone even in a public place was objectionable because it deprives them of an opportunity to prevent it happening).

21 *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.

22 *Pollard v Photographic Co* (1888) 40 ChD 345 (portrait photograph). See also *Tuck & Sons v Priester* (1887) 19 QBD 629 (copies of a drawing). The Copyright, Designs and Patents Act 1988 s 85 governs the position where a photograph or film is commissioned for private and domestic purposes: see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) paras 476-479. *Pollard v Photographic Co* supra is also authority for the proposition that if a photographer takes a picture of a person without that person's consent, use of the picture for advertising cannot be restrained. However, use of a photograph may be actionable, exceptionally, in passing off: see *Irvine v Talksport Ltd* [2002] EWHC 367 (Ch), [2002] 2 All ER 414, [2002] 1 WLR 2355 ('doctored' photograph misrepresented celebrity's endorsement of product) (revised in part, but not on this point [2003] EWCA Civ 423, [2003] 2 All ER 881). Such use may also be defamatory: *Tolley v JS Fry and Sons* [1931] AC 333, HL.

23 *Amber Size and Chemical Co v Menzel* [1913] 2 Ch 239.

24 *Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink plc* [1989] FSR 135, CA.

25 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101.

26 *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 138, 140, [1986] 1 All ER 617 at 627, 628-629, CA.

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NOTE 19--*Douglas*, cited, reversed in part: [2007] UKHL 21, [2008] 1 AC 1.

NOTE 21--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(4) LIMITS OF CONFIDENCE/418. Freedom of expression.

418. Freedom of expression.

The Human Rights Act 1998 requires due regard to be given to the right to freedom of expression before granting any relief that may interfere with that right¹. Such relief is not to be granted restraining publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed², while the court must recognise that an interim appeal could effectively decide the outcome of the proceedings³. The court must have particular regard to the Convention right⁴ to freedom of expression and, where the

proceedings relate to journalistic, literary or artistic material (or conduct connected with such material), to: (1) the extent to which (a) the material has or is likely to become available to the public; or (b) it is or would be in the public interest for the material to be published; and (2) any relevant privacy code⁵.

An injunction seeking to protect other Convention rights, and grounded in the domestic law of confidence, is in accordance with the law and so represents a lawful restriction on freedom of expression⁶. At the same time, any interference with a free press has to be considered carefully because the existence of a free press is in itself desirable, regardless of the desirability of individual publications or the individual merits of any particular article, and the courts must not act as censors or arbiters of taste⁷.

A newspaper is entitled to publish particular confidential information to give credibility to a story correcting untrue public pronouncements made by a public figure, and the public interest in such circumstances allows the journalist reasonable latitude as to the manner in which that information is conveyed⁸. Where, in proceedings brought by the Crown, the court makes an order restraining a former Crown servant, until trial or further order, from disclosing information obtained in the course of his employment, the order, if otherwise a justified and proportionate restraint on freedom of expression, is not rendered objectionable by the inclusion of a proviso that it does not apply to any information in respect of which the Attorney General states in writing that it is not information the publication of which the Crown seeks to restrain⁹.

1 Human Rights Act 1998 s 12(1); Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10. The exercise of the right to freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society (amongst other things) for preventing the disclosure of information received in confidence: art 10(2). See also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 158.

2 Human Rights Act 1998 s 12(3). The word 'likely' in s 12(3) creates a threshold test of 'a real prospect of success convincingly established' and this requires the court actually to consider the merits of any claims for injunctive relief and to grant relief only if it is satisfied on cogent evidence that the claim does indeed have a real prospect of succeeding at trial, notwithstanding the defendant's right to freedom of expression: *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, [2001] 1 FLR 982, CA; *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] 2 All ER 318. This test is distinct from the test set in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL, which, on an application for an interim injunction, does not require the court normally to seek to form a view on the merits of the applicant's case at trial: *Cream Holdings Ltd v Banerjee* supra. Cf *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385 (approved in *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545).

See also *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 398 (the right to freedom of expression of a newspaper and a prostitute was likely to outweigh at trial the small degree of intrusion into the private life of a media personality who had visited a brothel where the prostitute worked).

3 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545.

4 If any right contained in the Convention for the Protection of Human Rights and Fundamental Freedoms as it is incorporated into English law by the Human Rights Act 1998. The court, as a public body, must act in accordance with the rights guaranteed under the Human Rights Act 1998 even when adjudicating on common law causes of action: *Venables v News Group Newspapers* [2001] Fam 430, [2001] 1 All ER 908, [2001] 1 FLR 791. For example, an order for disclosure of a journalistic source (see para 475 post) could not be compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms art 10 unless it was justified by an overriding public interest: *Mersey Care National Health Service Trust v Ackroyd* [2003] EWCA Civ 663, (2003) 147 Sol Jo LB 595.

5 Human Rights Act 1998 s 12(4). See *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, [2001] 1 FLR 982, CA (a breach of the Code of Practice of the Press Complaints Commission (1997) may justify a limitation on the right to freedom of expression in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms art 10(2)). As to the Press Complaints Commission and the Code of Practice see PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) para 464; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 449.

As to the application of the Data Protection Act 1998 to data processed for the purposes of journalism, literature or art see para 550 post.

- 6 *Venables v News Group Newspapers* [2001] Fam 430, [2001] 1 All ER 908.
- 7 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545.
- 8 *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.
- 9 *A-G v Punch Ltd* [2002] UKHL 50, [2003] 1 All ER 289, [2003] 2 WLR 49. Such a proviso does not subject the press to the censorship of the Attorney General since a third party whose conduct is affected by the order is always at liberty to apply to the court for the order to be varied so as to permit disclosure of particular information, but it is better to avoid the appearance of delegating to the Attorney General control of what may be published by making this plain on the face of the order: *A-G v Punch Ltd* supra. See also *A-G v Times Newspapers* [2001] EWCA Civ 97, [2001] 1 WLR 885 (a newspaper editor may judge whether his re-publication of information already in the public domain is in accordance with existing undertakings of confidentiality and any requirement to obtain prior confirmation from the court or from the Attorney General is a fetter on his freedom of expression); *H (A Healthcare Worker) v Associated Newspapers Ltd, H (A Healthcare Worker) v N (A Health Authority)* [2002] EWCA Civ 195, [2002] EMLR 425 (an order preventing a newspaper from soliciting information about the identity of a healthcare worker, who was diagnosed HIV positive and who was taking proceedings against his employer, was too draconian a fetter on its freedom of expression); *Jockey Club v Buffham* [2002] EWHC 1866 (QB), [2003] QB 462 (desirability of upholding confidentiality agreements did not outweigh the public interest in the publication of the material).

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418 Freedom of expression

NOTE 2--*Cream Holdings*, cited, reversed: [2004] UKHL 44, [2004] 4 All ER 617. See also *A v B* [2005] EWHC 1651 (QB), [2005] EMLR 851. The court should be exceedingly slow to grant an interim restraint order where the applicant had not satisfied the court that he would probably, more likely than not, succeed at trial: *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2007] 3 WLR 289.

NOTE 4--*Mersey Care*, cited, reported at [2003] EMLR 820. See also Application 64752/01 *Voskuil v Netherlands* (2008) 24 BHRC 306, ECtHR.

NOTE 5--See *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] 2 FCR 309 (newspaper published addresses of children with behavioural problems; injunction awarded to restrain publication as protection of children more important than public interest in disclosure of addresses); *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2007] 2 All ER 139 (newspaper printed extracts from private journal; claim for breach of confidence allowed); *McKennitt v Ash* [2006] EWHC Civ 1714, [2007] 3 WLR 194 (book about folk singer; privacy and duty of confidence outweighed public interest in contents); and *Commissioner of Police of Bermuda v Bermuda Broadcasting Co Ltd* [2008] UKPC 5, [2008] All ER (D) 240 (Jan) (no injunction where some information already in public domain and no evidence that further information of a different nature would be disclosed). See Application 69698/01 *Stoll v Switzerland* (2008) 24 BHRC 258, ECtHR (journalist's freedom of expression in disclosing contents of confidential diplomatic report outweighed by potential threat to country's diplomatic relations).

NOTE 8--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Many provisions of the data protection legislation¹, enacted to give effect to the EC Data Protection Directive², are relevant to the observance or modification of obligations of confidence³. However, no enactment or rule of law prohibiting or restricting the disclosure of information precludes a person from furnishing such information to the Information Commissioner⁴ or to the Information Tribunal⁵ as is necessary for the discharge of their functions⁶. The seventh data protection principle⁷ imposes a general obligation to ensure security in respect of all data, and this might be highly relevant to the protection of confidences; various other provisions of the Data Protection Act 1998 have particular relevance to data held for medical⁸, legal⁹, or educational purposes¹⁰.

1 See the Data Protection Act 1998; and para 503 et seq post.

2 Ie EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data: Data Protection Act 1998 s 70(1).

3 As to the regard to be had to trade secrets and to the duty of confidentiality when complying with subject access requests under the Data Protection Act 1998 see paras 524-525 post.

4 As to the Information Commissioner see para 518 post. Obligations of confidence are imposed upon the Commissioner, his staff and his agents: see para 523 post.

5 As to the Information Tribunal see para 521 post.

6 See para 522 post.

7 As to the seventh data protection principle see para 516 post. Additionally, the first data protection principle (see paras 508-510 post) requires personal data to be processed fairly and lawfully and in accordance with specified conditions (and in accordance with additional conditions that apply in the case of sensitive personal data); the second data protection principle (see para 511 post) restricts data use to its particular purpose; the third data protection principle (see para 512 post) requires data to be adequate, relevant and not excessive in relation to its particular purpose; the fourth data protection principle (see para 513 post) requires data to be accurate and up to date; the fifth data protection principle (see para 514 post) requires data to be kept no longer than necessary for its particular purpose; and the sixth data protection principle (see para 515 post) requires personal data to be processed in accordance with the rights of data subjects under the Data Protection Act 1998. As to the eighth data protection principle, dealing with transfers of personal data to a country or territory outside the European Economic Area, see para 517 post.

8 See eg the provisions relating to sensitive personal data (see para 510 post); the provisions enabling exemption from, or modification of, provisions for data relating to a person's physical or mental health (see para 548 post); provisions relating to health and safety at work (see para 549 head (5) post); and special provisions for providing access to confidential patient information (see paras 577-578 post).

9 See eg the provisions relating to sensitive personal data (see para 510 post); the disapplication of the eighth data protection principle (see para 517 post); the exemption for disclosures required in connection with legal proceedings (see para 554 post); and the exemption for data subject to legal professional privilege from the requirement to provide information to the Information Commissioner (see paras 562-563 post).

10 See eg the provisions enabling the exemption from or modification of provisions relating to education data (see para 548 post); and the provisions relating to data processed for the purposes of research, history and statistics (see para 551 post).

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419 Data protection

NOTE 2--See Cases C-317/04; C-318/04 *European Parliament v European Council* [2007] All ER (EC) 278, ECJ.

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(5) CREATION OF CONFIDENCE

420. Creation of confidence by statute or subordinate legislation.

The commencement, content and limits of an obligation of confidentiality created by or under statute will depend on the terms of the relevant legislation¹.

1 See para 409 ante.

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421. Creation of confidence otherwise than by legislation.

In order to be protected, the information or other material must not only possess the attributes of limited availability¹ and specific character², but must also have been communicated to, obtained by or become known to the recipient in circumstances imposing a duty of confidence³. Accordingly, a duty of confidence arises whenever the party subject to the duty is in a situation where he either knew or ought to have known that the other person could reasonably expect his privacy to be protected⁴. There is no requirement for a prior relationship to exist between parties⁵ because the existence of a duty may be inferred from the facts, taking into account all the circumstances surrounding the relationship between the parties at the time a breach takes place or is threatened.

In both contract and equity, an obligation of confidence will be impliedly constituted when material is imparted in circumstances which make it clear that it is being communicated subject to restrictions of confidentiality⁶, as in the professional employment of a doctor⁷ or banker⁸. It is uncertain how far the unsolicited communication of material with an indication that it is to be treated as confidential can impose an obligation on the recipient. It is settled that if the information is already independently available to the recipient no obligation arises⁹. Pre-contractual negotiations may give rise to an obligation if the requirements of protected confidence are present¹⁰.

In both contract and equity, implied obligations of confidence have been established using similar criteria¹¹ (although in contract reference has been made to the 'business efficacy test'¹²). The test, which is objective, is whether the recipient ought to have known that the material was confidential since there will be liability not only for deliberate but also subconscious misuse¹³, and the test of the reasonable man has been invoked to determine what ought to have been appreciated by the recipient¹⁴. An obligation may also be created when one party agrees to acquire information for another subject to confidence¹⁵.

Obligations of confidentiality may be created expressly, but express terms must be such as to maintain the restricted availability and specific character essential to protected confidence.

If the material is so widely published or disseminated as to negate the necessary attributes¹⁶, or if no instructions or administrative procedures are employed to safeguard them¹⁷, no obligation will exist.

1 See para 411 ante.

2 See para 412 ante.

3 'Information must have been imparted in circumstances importing an obligation of confidence': *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47 per Megarry J. An obligation of confidence may be specifically constituted where the recipient is placed in a position where confidential information can be acquired by observation: *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

4 *A v B plc* [2002] EWCA Civ 337 at [11], [2003] QB 195 at [11], [2002] 2 All ER 545 at [11] per Lord Woolf.

5 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA (implied); *Stephens v Avery* [1988] Ch 449 at 455-456, [1988] 2 All ER 477 at 482 (express).

6 The restrictions will often indicate the special purpose for which the material is being communicated: *Morison v Moat* (1851) 9 Hare 241; *Pollard v Photographic Co* (1888) 40 ChD 345; *Lamb v Evans* [1893] 1 Ch 218, CA; *Mechanical and General Inventions Co Ltd v Austin and Austin Motor Co* [1935] AC 346, HL; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n, 65 RPC 203, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Bostitch Inc v McGarry & Cole Ltd* [1964] RPC 173; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429; *Torrington Manufacturing Co v Smith & Sons (England) Ltd* [1966] RPC 285; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 (on appeal (but the appeal reported first) [1960] RPC 128, CA); *Suhner & Co AG v Transradio Ltd* [1967] RPC 329; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA.

7 See para 439 post.

8 See para 454 post.

9 The recipient may be wise to return the embodying material to the confider with a statement that he does not accept it on terms of confidentiality: *Johnson v Heat and Air Systems Ltd* (1941) 58 RPC 229.

10 *Gunston v Winox Ltd* (1920) 37 TLR 74 (injunction granted as information not independently available); *Mechanical and General Inventions Co Ltd v Austin and Austin Motor Co* [1935] AC 346, HL; *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA; *Harrison v Project and Design Co (Redcar) Ltd* [1978] FSR 81. But see *Auto Securities Ltd v Standard Telephones and Cables* [1965] RPC 92 (injunction refused on balance of convenience); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (all requirements not shown).

11 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n, 65 RPC 203, CA; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429. See also *Lamb v Evans* [1893] 1 Ch 218, CA; *Alperton Rubber Co v Manning* (1917) 86 LJCh 377; *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL).

12 See *The Moorcock* (1889) 14 PD 64, CA; *Lamb v Evans* [1893] 1 Ch 218, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97. See also CONTRACT vol 9(1) (Reissue) para 782.

13 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.

14 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 (cited in *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 380; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92 at 108, CA.) The test may be assisted by surrounding circumstances as when the recipient occupies an appointment of obvious trust (*Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461 at 480) or by relevant custom and practice (*Gilbert v Star Newspaper Co Ltd* (1894) 11 TLR 4). Professional codes of conduct and circulars may provide evidence of such custom and practice. Eg see the General Medical Council guidelines approved in *W v Egdell* [1989] 1 All ER 1089 at 1101-1102 (affd [1990] Ch 359 at 420, [1990] 1 All ER 835 at 849, CA); and as to those guidelines generally see para 439 et seq post.

15 *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545 (newspapers publishing memoirs of intelligence officer which had been published in book form in breach of confidence); *Industrial Furnaces Ltd v Reaves* [1970] RPC 605.

16 *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; *United Indigo Chemical Co Ltd v Robinson* (1931) 49 RPC 178; *E Worsley & Co Ltd v Cooper* [1939] 1 All ER 290; *Amway Corp v Eurway International Ltd* [1974]

RPC 82; *Aveley/Cybervox Ltd v Boman and Sign Erections Ltd* [1975] FSR 139; *Sun Printers Ltd v Westminster Press Ltd* (1982) 126 Sol Jo 260, CA; and see *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 138, 140, [1986] 1 All ER 617 at 627, 629, CA. The necessary attributes are given in the text to notes 1-3 supra.

17 *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345; *Aveley/Cybervox Ltd v Boman and Sign Erections Ltd* [1975] FSR 139; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 138, 140, [1986] 1 All ER 617 at 627, 629, CA. If precautions are taken this will support confidentiality: *Standex International Ltd v CB Blades Ltd* [1976] FSR 114 at 121, CA. It is at least arguable that confidentiality can be inferred from the nature of an operation and the imposition of security measures: *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444; *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, [2001] 1 FLR 982, CA.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(5) CREATION OF CONFIDENCE/422. Third party recipients of confidential material.

422. Third party recipients of confidential material.

A third party who acquires or receives confidential material which he knew or ought to have known was subject to confidence may be restrained by injunction from any further dealing¹ or may be liable to an account of profits². If the third party knowingly induces a party under a contractual obligation of confidence to break that contract, the third party may be liable for the tort of inducing breach of contract³ and if the third party improperly handles some document or other tangible embodiment of the confidential material he may be liable for trespass to goods⁴ or conversion⁵.

Constructive notice will be found if a third party can be shown to have deliberately refrained from inquiring whether material was being communicated in breach of confidence⁶. If the third party initially receives the confidential material innocently, without knowledge or notice that it has been communicated in breach of confidence, no liability will be incurred. Liability will be incurred only when the innocent party knows or ought to know of the impropriety affecting the communication⁷. It is doubtful whether bona fide purchase for value is a defence⁸.

1 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); *Morison v Moat* (1851) 9 Hare 241; *Liquid Veneer Co Ltd v Scott* (1912) 29 RPC 639; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545, HL (injunction not granted since wide publicity for the confidential material had rendered it futile).

2 'The fact that a primary confidant, having communicated the confidential information to a third party in breach of obligation, is about to reveal it similarly to someone else, does not entitle that third party to do the same': *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 261, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 644, HL, per Lord Keith of Kinkel. In *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL, the Crown had no direct right of recourse against the publisher and the court made an order for an account of profits only against the defendant, albeit that the profits were held by the publisher, whom the defendant joined to proceedings as a third party on a counterclaim.

3 See para 405 ante; and TORT vol 97 (2010) PARA 614 et seq.

4 See para 405 ante; and TORT vol 45(2) (Reissue) PARA 659 et seq.

5 See para 405 ante; and TORT vol 45(2) (Reissue) PARA 548 et seq.

6 *London and Provincial Sporting News Agency Ltd v Levy* (1928) [1923-1928] MacG Cop Cas 340. Companies formed to use information obtained in breach of confidence will be regarded as affected by notice: *Liquid Veneer Co Ltd v Scott* (1912) 29 RPC 639; *Litholite Ltd v Travis* (1913) 30 RPC 266; *Reid & Sigrist Ltd v*

Moss and Mechanism Ltd (1932) 49 RPC 461; *Cranleigh Precision Engineering v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605; *Standex International Ltd v CB Blades* [1976] FSR 114; and see *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658-659, HL, per Lord Goff of Chieveley.

7 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal 1 Mac & G 25); *Rex Company and Rex Research Corp v CH Muirhead and HM Comptroller of Patents* (1926) 44 RPC 38; *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* (1951) 68 RPC 190 (revised on other grounds [1952] 1 TLR 101, 69 RPC 10, CA); *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] RPC 239; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593; *Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 All ER 620; *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418, [1986] 1 WLR 1419, CA; *Hoechst UK Ltd v Chemiculture Ltd* [1993] FSR 270. See also *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL, per Lord Goff of Chieveley; *Valeo Vision SA v Flexible Lamps Ltd* [1995] RPC 205 (innocent party's conscience not bound in equity).

8 The following cases suggest it is not a defence: *Duke of Queensberry v Shebbeare* (1758) 2 Eden 329; *Richards v Dobell* (1912) [1911-1916] MacG Cop Cas 51; *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans* (1951) 68 RPC 190 at 195 (on appeal [1952] 1 TLR 101, 69 RPC 10, CA). *Contra Morison v Moat* (1851) 9 Hare 241 at 263. See also *Nourse L* in *A-G v Observer Ltd* [1986] CA Transcript 696, cited in *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 327-328, [1987] 1 WLR 1248 at 1265 per Browne-Wilkinson V-C; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 177, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 596, CA. See Jones 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463 at 479-481. Some Canadian authorities have accepted the defence of bona fide purchase for value: see *International Tools v Kollar* (1968) 67 DLR (2d) 386 at 391; *Tenatronics Ltd v Hauf* (1972) 23 DLR (3d) 60. Bona fide purchasers may be protected by change of position: *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

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(6) CONTINUANCE OF OBLIGATIONS OF CONFIDENCE

423. Duration of an obligation.

The duration of an obligation arising from an agreement, contractual or otherwise, will depend primarily on the terms, express or implied, of the agreement. In contracts of employment such terms will be subject to the requirements of reasonableness resulting from public policy¹ and if these requirements are not observed then, subject to the possibility of severance², the terms will not be binding. An employee may continue to be bound by a contractual obligation of confidence even if the public could obtain the relevant information by buying and dismantling or analysing products in which it is embodied³. This may apply only when others have to expend work or money to obtain the information⁴. If the information is freely available without the need for significant investigation then the obligation of confidence may cease to bind⁵.

Terms in restraint of trade⁶ may continue to bind ex-employees who have had access to trade secrets or opportunities to influence goodwill, but the longer the term and the wider the scope of the covenant, the heavier will be the onus of proving that it is reasonable⁷. In appropriate circumstances lifelong and worldwide covenants may be upheld⁸. If an express term of an agreement makes it clear that all obligations of confidence are to lapse with the expiry of a specified period, then that will happen, but if the agreement states merely that an obligation of confidence will continue for a specified period, that obligation will not necessarily lapse when that period expires, since an implied term or equitable obligation which has not been excluded by the express term may continue to apply⁹.

With governmental confidences, public interest in freedom of information may allow a relaxation¹⁰ or security considerations may require perpetual non-disclosure¹¹. A member of the intelligence services owes a lifelong obligation of confidence to the Crown in relation to governmental secrets¹², but a former cabinet minister may, after a sufficient interval, publish diaries recording proceedings at cabinet meetings where there is no indefinitely continuing public interest in maintaining the confidentiality of cabinet meetings and the disclosures are unlikely to raise an issue of national security¹³.

Publication of confidential material in an application for a patent may involve sufficiently full disclosure to terminate the obligation in whole or in part¹⁴. If information is disclosed in confidence to a party for a special purpose and in a fiduciary capacity, that party may be restrained from using the information for his own purposes even if much of it is available to the public¹⁵. It may be that the duty to preserve confidentiality will not be eroded or terminated by adventitious publicity¹⁶. If a confidant improperly destroys confidentiality by publication of the entrusted material he may continue to be under a duty of confidence¹⁷.

The discloser may be liable in damages or to an account of profits and may come under a specific duty, akin to the 'springboard' doctrine¹⁸, not to use the formerly confidential material to his own advantage. An injunction granted by the court to restrict a defendant's freedom so as to prevent him from gaining an unfair advantage from confidential information obtained in former employment should be restricted to a period during which any advantage might last¹⁹.

Confidential information that has been disclosed for the purposes of litigation does not necessarily lose its confidential character, but the continuation of confidence may depend upon the circumstances attending the proceedings and upon orders of the court²⁰.

1 *A-G v Barker* [1990] 3 All ER 257, CA (lifelong and worldwide restriction held to be valid since it did not restrict future employment).

2 *Nordenfelt v Maxim-Nordenfelt Guns and Ammunition Co* [1894] AC 535, HL; *Attwood v Lamont* [1920] 3 KB 571, CA; *Mason v Provident Clothing Supply Co Ltd* [1913] AC 724 at 745, HL; *Putsman v Taylor* [1927] 1 KB 637; *Scorer v Seymour-Johns* [1966] 3 All ER 347, [1966] 1 WLR 1419.

3 *Merryweather v Moore* [1892] 2 Ch 518; *Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461.

4 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97 at 104. See also para 424 post.

5 See *A-G v Observer Ltd*, *A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (improper disclosure did not terminate an obligation to account). See also note 17 infra.

6 *A-G v Barker* [1990] 3 All ER 257, CA (an express lifelong and worldwide covenant not to reveal personal confidential information during and after the employment was upheld since it was not in restraint of trade). As to restraint of trade see COMPETITION vol 18 (2009) PARA 377 et seq.

7 *Attwood v Lamont* [1920] 3 KB 571 at 589, CA.

8 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, HL; *Fitch v Dewes* [1921] 2 AC 158, HL.

9 *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA; *Triplex Safety Glass Co Ltd v Scorah* [1938] Ch 211, [1937] 4 All ER 693; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; contra *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202, CA. See also *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA.

10 *A-G v Jonathan Cape Ltd*, *A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484. See also the Freedom of Information Act 2000, which provides a regime for the disclosure of information held by public authorities.

11 *A-G v Observer Ltd*, *A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. This duty is also given statutory force by the Official Secrets Acts 1911 to 1989: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 478 et seq. See *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477 (the lifelong obligation of confidentiality imposed

upon serving and former members of the security and intelligence services by the Official Secrets Act 1989 is a proportionate interference with the right to freedom of expression guaranteed by the Human Rights Act 1998 because disclosures may be made with lawful authority, and any refusal of authority may be open to judicial review).

12 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 226, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 633, CA, per Bingham LJ, at 268 and 647, HL, per Lord Brightman, and at 284 and 660 per Lord Goff of Chieveley.

13 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484.

14 *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL; *Franchi v Franchi* [1967] RPC 149. However, local disclosure of information may not destroy confidentiality elsewhere: *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48; *Exchange Telegraph Co Ltd v Gregory & Co* [1896] 1 QBD 147; *Exchange Telegraph Ltd v Howard* (1906) 22 TLR 375.

15 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA (journalist who obtains confidential information during employment as a professional adviser is under a fiduciary obligation not to use it for his own purposes), explained as an application of the 'springboard' doctrine (see para 424 post) in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 149, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 575 per Scott J, and at 177 and 595-596, CA, per Donaldson MR (affd [1990] 1 AC 109, [1988] 3 All ER 545, HL); and *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 328, [1987] 1 WLR 1248 at 1263 per Browne-Wilkinson V-C.

16 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 28, [1981] 2 All ER 321 at 339, CA, per Shaw LJ.

17 *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA. This has been doubted on the grounds of absurdity, including the possible consequence that third parties dealing with the confidant would come under a duty of confidence even although the information was common knowledge: see *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 285 et seq, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 661 et seq, HL.

18 See para 424 post.

19 *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA.

20 See para 502 post.

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424. The 'springboard' doctrine.

This doctrine expresses the principle that a party in possession of confidential information which is the subject-matter of an equitable obligation of confidence will not be allowed to use that information as a 'springboard' to enable him to enter the market more cheaply and speedily than others who would have to work or spend money to obtain it. Thus a party may be restrained from acting in breach of such an obligation even if others, not so bound, could acquire the information by buying, dismantling, analysing or examining products embodying it¹. The doctrine will apply only if the relevant information retains partial confidentiality, and it is a question of fact and degree in each case whether the information has become so generally available that the person bound would have no advantage over members of the public². The doctrine therefore operates for a limited period only³.

1 For the doctrine's original formulation see *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 at 391 per Roxburgh J ('As I understand it, the essence of this branch of the law ... is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the

person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public¹); on appeal (but the appeal reported first) [1960] RPC 128, CA. See also *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97 at 103; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; and see *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 387; *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202 at 206, CA; *Harrison v Project and Design Co (Redcar) Ltd* [1978] FSR 81 at 88; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 285, 288, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 661, 664, HL. See also *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138 (the springboard doctrine does not apply to information, contained in a product bought on the open market, where the information has been accessed through the special labours of reverse-engineering and decryption).

2 *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 387; *Harrison v Project and Design Co (Redcar) Ltd* [1978] FSR 81 at 88; and see *Ackroyds (London) Ltd v Islington Plastics* [1962] RPC 97 at 104; *Franchi v Franchi* [1967] RPC 149 at 153.

3 *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202 at 206-207, CA; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402 at 407, [1964] 1 WLR 96; *Harrison v Project and Design Co (Redcar) Ltd* [1978] FSR 81 at 87; *Prout v British Gas plc* [1992] FSR 478, Patents County Court (doctrine ended on filing patent application); *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA; *Fisher-Karpark Industries Ltd v Nichols* [1982] FSR 351.

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(7) TERMINATION OF OBLIGATIONS OF CONFIDENCE

425. Release from obligation of confidence.

Release may be express or implied, total or partial¹, as when restricted to a specific transaction or to part of the information covered². Release must be effected by the person to whom the obligation of confidence is owed³. If that person makes the information publicly available, as in a patent application, this may amount to an implied release⁴. It is unclear whether a party under an obligation of confidence who improperly makes the information publicly available will continue to be bound⁵; some authority suggests that he will not continue to be bound but may nevertheless be liable in damages or to an account of profits⁶. A party who owes an obligation of confidence will not be impliedly released from it merely by showing that the person to whom it is owed knows that he has already endangered the confidence or is likely to act in breach of it⁷. If the obligation is owed to a trustee or fiduciary, the agreement of the beneficiaries or principals to a release is essential⁸.

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, 485-486, CA; *Sunderland v Barclays Bank Ltd* (1938) 5 Legal Decisions Affecting Bankers 163 at 164; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414, DC; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL, explained in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 285, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662, HL, per Lord Goff of Chieveley. In the release of a contractual obligation problems of accord and satisfaction and equitable estoppel may arise: see *Ackroyds (London) Ltd v Islington Plastics Ltd* supra at 104; and CONTRACT vol 9(1) (Reissue) para 1043 et seq.

2 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 486, CA; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416 at 418, [1964] 1 WLR 109n at 111-112.

3 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752 at 770, [1975] 3 All ER 485 at 495 (cabinet minister owes obligation to Queen and cannot be released from it by colleagues). A patient may release a doctor from medical confidentiality: *C v C* [1946] 1 All ER 562. A client may waive legal professional privilege: *Wilson v Rastall* (1792) 4 Term Rep 753.

4 *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL, as explained in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 285, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662, HL, per Lord Goff of Chieveley.

5 *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, CA.

6 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 286-288, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662-664, HL, per Lord Goff of Chieveley. See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL (in the special circumstances of the intelligence services, there were good grounds: (1) for imposing an absolute rule against disclosure, even though the information disclosed was no longer confidential; and (2) for ordering an account of profits in response to the breach, when the magnitude of the royalties from publication may be attributed to the defendant's notoriety as a spy); and para 469 post.

7 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752 at 768, [1975] 3 All ER 484 at 493; *Taylor v Blacklow* (1836) 3 Bing (NC) 235 (solicitor acting for both parties not released); *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 261, 292, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 644, 667, HL.

8 *Boardman v Phipps* [1967] 2 AC 46 at 105, [1966] 3 All ER 721 at 743-744, HL; *Carter v Palmer* (1842) 8 Cl & Fin 657, HL.

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426. Frustration.

An obligation of confidence created by contract may be frustrated¹ by supervening illegality if statute prohibits the continued preservation of confidence² or if a change of circumstance renders its continuance contrary to public policy³. If a business where trade secrets or goodwill are protected by confidence ceases to exist without those assets being transferred to a successor, the obligations also cease to exist⁴. If the relevant information becomes so widely known that it can be regarded as fully in the public domain this, too, may determine obligations of confidence⁵.

The death of a party to whom the obligation is owed will not necessarily frustrate the obligation of confidence⁶.

1 As to frustration see CONTRACT vol 9(1) (Reissue) para 897 et seq.

2 As to statutory duties of disclosure see the Terrorism Act 2000 s 19; the Proceeds of Crime Act 2002 s 327; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 394; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 791.

3 See *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA (where the confidentiality of a medical opinion that a mental patient was dangerous was defeated by the obligation to disclose when the patient was applying for release from hospital); and para 441 post.

4 Cf *Rhodes v Forwood* (1876) 1 App Cas 256 at 274, HL (closure of business ends agency); *Measures Bros Ltd v Measures* [1910] 2 Ch 248; *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL (wrongful dismissal

repudiates contract; employee no longer bound); *Northey v Trevillion* (1902) 18 TLR 648. It would seem that obligations of confidence arising from equity, contract and tort would similarly cease.

5 *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL; *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA. As to the view that it is absurd for the bound party to remain bound once his wrongful act has caused it to become public see *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 286-288, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662-664, HL, per Lord Goff of Chieveley.

6 See para 428 post.

UPDATE

426 Frustration

NOTE 5--A photograph or the very words spoken in a private conversation can have a greater impact and cause greater embarrassment than an account of the information contained therein. Therefore, such a photograph or tape of such a conversation may be confidential even though the information contained in it is in the public domain: *D v L* [2003] EWCA Civ 1169, [2004] EMLR 1. See also *EPI Environmental Technologies Inc v Symphony Plastic Technologies plc* [2004] EWHC 2945 (Ch), [2005] 1 WLR 3456.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(7) TERMINATION OF OBLIGATIONS OF CONFIDENCE/427. Repudiation.

427. Repudiation.

Repudiatory breach on the part of the party entitled to confidence will release the party bound by the obligation¹.

1 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL; *Measures Bros Ltd v Measures* [1910] 2 Ch 248; cf *Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, [1995] 3 All ER 211.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(7) TERMINATION OF OBLIGATIONS OF CONFIDENCE/428. Death.

428. Death.

A doctor's obligation of confidence is not necessarily ended by the death of his patient but will depend on all the circumstances, including the nature of the information, the extent to which it is already available and the length of time since death¹. Where an application for access to the health records of a deceased patient is made by the patient's personal representatives or any person who may have a claim arising out of the patient's death, access must not be given if the record includes a note, made at the patient's request, that he did not wish access to be given on such an application². Where such an application is made, access must not be given to any part of the record which, in the opinion of the holder of the record, would disclose information which is not relevant to any claim which may arise out of the patient's death³. Similarly, a

banker or solicitor may continue to be bound by an appropriate obligation of confidence after the death of a customer or client⁴.

In so far as confidential information possesses the character of property, it devolves on death on personal representatives⁵. With commercial, literary and dramatic confidences this is assisted by the close links with patents, designs and copyright law⁶.

1 See para 440 post.

2 Access to Health Records Act 1990 ss 3(1)(f), 4(3). See also MEDICAL PROFESSIONS vol 30(1) (Reissue) para 216.

3 Ibid s 5(4).

4 For bankers this is in accordance with principle, and there appears to be no authority to the contrary. As to a solicitor's duty of confidentiality upon a client's death see the Guide to the Professional Conduct of Solicitors (1999) Principle 16.01 para 3; and para 453 note 7 post.

5 *Canham v Jones* (1813) 2 V & B 218. As to the recognition of property in information see para 407 note 7 ante.

6 See para 401 notes 4-8 ante.

UPDATE

428 Death

NOTE 4--*Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) replaced, with effect from 1 July 2007, by the *Solicitors' Code of Conduct 2007*.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(7) TERMINATION OF OBLIGATIONS OF CONFIDENCE/429. Divorce.

429. Divorce.

Divorce does not terminate the obligations of matrimonial confidence¹.

1 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611; but see *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA (no protection where parties had previously made disclosures to the press).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(7) TERMINATION OF OBLIGATIONS OF CONFIDENCE/430. Purchase by third party.

430. Purchase by third party.

It may be that a bona fide purchaser for value without notice of confidential information will take the information free of the restrictions of confidence, but this is not free from doubt¹.

1 See para 422 text and note 8 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(i) Employers' Confidences/431. In general.

(8) CLASSIFICATION OF CONFIDENCES

(i) Employers' Confidences

431. In general.

Employees owe an implied duty of good faith to their employers which may include an obligation of confidence¹. Where the duty is made express, most often by being contained in a contract of employment, the employer must take care to define clearly the scope of the confidential information². It is essential for the employer especially to distinguish knowledge of his goodwill and trade secrets, which can be protected as confidential, from the employee's personal skills, experience and knowledge, which cannot be subject to restraint³. Accordingly, 'know-how' that amounts to knowledge of scientific and industrial processes may be protected if it meets the general requirements of restricted availability and definite character which will enable it to be treated as a trade secret⁴. On the other hand, an employee is entitled to use and to put at the disposal of new employers all his 'know-how', in terms of his acquired skill and knowledge, regardless of where he acquired it and regardless of whether it was secret at the time he acquired it, so long as it can no longer be protected as confidential to his former employer⁵. Knowledge of the reasonable mode of general organisation and management of a business may not be a trade secret⁶.

The employee's obligation of confidence may continue after the employment has terminated⁷, and in order to protect trade secrets or goodwill⁸ the employer can rely on an express term of a contract to restrain trade, provided that the term is no more widely drafted than is necessary or reasonable⁹. When contractual obligations of confidence take the form of terms in restraint of trade in contracts of employment they are subject to the rules of public policy governing such terms¹⁰. The employer can secure fuller protection whilst the employment subsists than after it terminates¹¹, when the terms must be no wider than is reasonably necessary to protect the employer's goodwill and trade secrets¹². The terms must not purport to prevent the former employee using his acquired skills and knowledge when to do so would not prejudice the goodwill or trade secrets¹³. Matters covered by a term in restraint of trade may also be covered by implied obligations in the contract of employment¹⁴. If an express term is narrower than these implied obligations this will not of itself prevent effect being given to the wider implied obligation¹⁵.

An employer may also owe obligations of confidence to an employee¹⁶.

1 See EMPLOYMENT vol 39 (2009) PARA 55. Many of the cases from which the principles relating to the law of confidence and confidentiality are drawn are cases involving 'trade secrets' and an employer/employee relationship. The wide reach of employment obligations of confidence may conflict with other such obligations eg where personal confidences or medical confidences are engaged: see eg para 440 note 6 post.

2 The onus is on the employer to define the exact nature and extent of the confidential information to prevent harassment or oppression of the employee: *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289.

3 *Herbert Morris Ltd v Saxonby* [1916] 1 AC 688, HL; *E Worsley & Co Ltd v Cooper* [1939] 1 All ER 290; *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* [1952] 1 TLR 101, 69 RPC 10, CA; *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] 1 WLR 1; *Coral Index Ltd v Regent Index Ltd* [1970] RPC 147; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117, [1986] 1 All ER 617, CA (separability not regarded as conclusive but the fact that the alleged confidential material was part of a package containing non-confidential material could throw light on its status; not everything carried in the memory from former employment can be used in a new employment); *Johnson & Bloy (Holdings) v Wolstenholme Rink plc* [1989] FSR 135, CA; *SBJ Stephenson Ltd v Mandy* [2000] IRLR 233 (the distinction between information learned with deliberate intent to misuse and that innocently carried in the employee's head is not determinative of protection afforded to information; the true distinction was drawn in *Herbert Morris Ltd v Saxonby* supra between 'objective' knowledge, which is the property of the employer, and 'subjective' knowledge, which is the employee's own property). See also *Poly Lina Ltd v Finch* [1995] FSR 751.

4 As to matters to be considered when deciding what is a trade secret see *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 137-138, [1986] 1 All ER 617 at 626-627, CA. Special methods of design and construction may be trade secrets: *Reid and Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461 (manufacture of aircraft turn indicators). However, a programming technique that could have been identified by a skilled person working from public sources was merely a useful technique which an ex-employee was free to use on leaving employment unless restricted by covenant: *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95, (1999) Times, 19 May. Information relating to a company's solvency, its ability to carry on business and its relationship with its holding company is not a trade secret: *Brooks v Olyslager OMS (UK) Ltd* [1998] IRLR 590, CA.

5 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289.

6 *Herbert Morris Ltd v Saxonby* [1916] 1 AC 688 at 705, HL, (approving *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 774). Prices charged or to be charged may or may not be trade secrets: see *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 140, [1986] 1 All ER 617 at 627-628, CA; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227 at 248, [1978] 3 All ER 193 at 209; cf *Berkeley Administration Inc v McClelland* [1990] FSR 505.

7 See EMPLOYMENT vol 39 (2009) PARA 59. A lifelong and worldwide ban on disclosing confidential information about the private lives of employers will be upheld if it does not restrict future employment and competition by the former employee: *A-G v Barker* [1990] 3 All ER 257 (ex-employee of the royal household seeking to publish book disclosing confidential information about the royal family was held to be in breach of contract of employment). See further paras 404, 423 ante.

8 The employer must have trade secrets or goodwill, otherwise the court will not intervene: see *Mainmet Holdings plc v Austin* [1991] FSR 538; *Berkeley Administration Inc v McClelland* [1990] FSR 505.

9 See COMPETITION vol 18 (2009) PARA 409 et seq.

10 See CONTRACT vol 9(1) (Reissue) para 866; EMPLOYMENT vol 39 (2009) PARA 19. See also the Public Interest Disclosure Act 1998, which affects contractual duties of confidentiality between employer and employee; para 432 post; and EMPLOYMENT vol 39 (2009) PARAS 56-57.

11 In current employment mere competition may be barred: *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731 at 737, [1965] 1 WLR 1 at 7; *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 135-136, [1986] 1 All ER 617 at 625, CA; *Brooks v Olyslager OMS (UK) Ltd* [1998] IRLR 590, CA.

12 *Herbert Morris Ltd v Saxonby* [1916] 1 AC 688, HL.

13 *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117, [1986] 1 All ER 617, CA. See also *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 at 351 (cited in *Ixora Trading Inc v Jones* [1990] FSR 251 at 261) (use of doctrine of confidence to place fetters on ex-employees' ability to compete potentially harmful).

14 *Lamb v Evans* [1893] 1 Ch 218, CA. This will cover trade secrets and goodwill. For a summary of the tests to determine whether a matter falls within the implied term, ie the nature of the employment and the nature of the information which, if not a trade secret, must be so confidential as to require the same protection, see *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 137, [1986] 1 All ER 617 at 625, CA.

15 *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA; *Triplex Safety Glass Co Ltd v Scorah* [1938] Ch 211, [1937] 4 All ER 693 (unreasonably wide express term does not preclude enforcement of reasonable narrower implied term). See also *Initial Services Ltd v Putterill* [1968] 1 QB 396, [1967] 3 All ER 145; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; but see *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202, CA; *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA.

16 *Prout v British Gas plc* [1992] FSR 478 (duty of confidence bound employer not to compromise the rights of employee in his invention). Employers are also subject to the terms of the Data Protection Act 1998, which places responsibilities on an organisation to process personal data that it holds in a fair and proper way: see eg the Employment Practices Data Protection Code (see para 518 note 9 post). As to the Data Protection Act 1998 generally see para 503 et seq post.

UPDATE

431 In general

NOTE 8--See *Freshtime UK Ltd v Wayne* [2006] All ER (D) 255 (Oct) (information that employer claimed was confidential, was 'innocuous').

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(i) Employers' Confidences/432. Statutory protection for disclosures by employees.

432. Statutory protection for disclosures by employees.

The Public Interest Disclosure Act 1998 renders void contractual duties of confidentiality between employer and employee¹ to the extent that they preclude the worker from making a 'protected disclosure'¹². A protected disclosure is a disclosure which is not itself a criminal offence but which raises legitimate concerns about the employer's business and is made in good faith through appropriate channels³.

1 As to contractual duties of confidentiality between employer and employee see para 431 ante.

2 As to protected disclosures see the Employment Rights Act 1996 Pt IVA (ss 43A-43L) (added by the Public Interest Disclosure Act 1998 s 1); and EMPLOYMENT vol 39 (2009) PARAS 56-57.

3 See the Employment Rights Act 1996 ss 43B-43C (as added: see note 2 supra); and EMPLOYMENT vol 39 (2009) PARAS 56-57. The jurisdiction of the Employment Appeal Tribunal in assessing claims of unfair dismissal and detriment arising from a protected disclosure depends upon the claimant establishing: (1) that a protected disclosure had been made, by satisfying all the requirements of the protected disclosure provisions on the evidence; and (2) that that was the principal reason for his treatment: *ALM Medical Services Ltd v Bladon* [2002] EWCA Civ 1085, [2002] ICR 1444. As to the Employment Appeal Tribunal see EMPLOYMENT vol 41 (2009) PARA 1384 et seq.

As to just cause or excuse for disclosures and the evidential basis under the law of confidence see paras 485-486 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/433. In general.

(ii) Personal Confidences

433. In general.

There is no general protection of privacy at common law¹, but the right to privacy in certain personal matters, particularly marital confidences, has been held to be one which the law should seek to protect². If it is in the public interest that confidences should be respected, the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself³. Protection has been extended not merely to family and domestic matters⁴, but also to recreational activities⁵ and in order to counter unsought publicity⁶. Protection extends not only to the confider but also to others who were to be shielded by the confidence⁷. However, protection will not be given to conduct that is grossly immoral⁸ or otherwise inimical to public policy⁹.

1 As to the right to personal privacy see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 110.

2 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 639, HL, per Lord Keith of Kinkel. See also para 435 post.

The European Commission for Human Rights has found an action for breach of confidence in English proceedings to be an adequate basis for the protection of the right to a private and family life, home and correspondence afforded by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8(1), especially as it relates to personal information, private communications and correspondence: see *Spencer (Earl) v United Kingdom* (1998) 25 EHRR CD 105, EComHR. This approach has been adopted, for example, in *A v B plc* [2002] EWCA Civ 337 at [4], [2003] QB 195 at [4], [2002] 2 All ER 545 at [4] per Lord Woolf (the rights to privacy and freedom of expression contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 8, 10 (as set out in the Human Rights Act 1998, Sch 1) provide new parameters for the court to decide actions for breach of confidence); and follows the general approach to 'right to privacy' actions in *Wainwright v Home Office* [2001] EWCA Civ 2081 at [96], [2002] QB 1334 at [96], [2002] 3 WLR 405 at [96] per Buxton LJ (Convention rights provide a catalyst for judicial development of traditionally nominate areas of the law by incremental evolution). See, however, *Peck v United Kingdom* (Application 44647/98) (2003) 13 BHRC 669, ECtHR (the disclosure to the media of film from a public security system was an unlawful interference with the applicant's right to respect for private life for which the law of confidence did not provide a remedy). As to freedom of expression as a limit upon the obligation of confidence see para 418 ante. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS.

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, HL, per Lord Keith of Kinkel.

4 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611 (matrimonial); *Thompson v Stanhope* (1774) Amb 737.

5 *Prince Albert v Strange* (1849) 2 De G & Sm 652; affd (1849) 1 Mac & G 25 (etchings for private circulation).

6 *Pollard v Photographic Co* (1888) 40 ChD 345 (public display of portrait photograph for advertising purposes). But see *Corelli v Wall* (1906) [1905-1910] MacG Cop Cas 41; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, HL, per Lord Keith of Kinkel (protection of anonymity of donor to charity). See also *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] NLR 595 (photographic representation of the wedding of two celebrities had the quality of confidence about it, being characterised either as a commercial confidence or as a hybrid kind in which elements had become commercial that would otherwise have been merely private).

7 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 (a breach may show the entruster in a favourable light but gravely injure some friend or relation of his whom he wishes to protect).

8 *Stephens v Avery* [1988] Ch 449 at 453, [1988] 2 All ER 477 at 481; and see *M and N v MacKenzie and News Group Newspapers Ltd and Twist* (18 January 1988, unreported), cited in *Stephens v Avery* supra at 456 and 482.

9 See paras 416 ante, 485 post.

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433 In general

NOTE 6--*Douglas*, cited, reversed in part: [2007] UKHL 21, [2008] 1 AC 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/434. Obligations of confidence between parent and child.

434. Obligations of confidence between parent and child.

Letters from a father to his son have been held to be protected by an obligation of confidence¹.

1 *Thompson v Stanhope* (1774) Amb 737. It is probable that the principle would extend to confidences arising out of other, analogous, family relationships.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/435. Obligations of confidence between husband and wife.

435. Obligations of confidence between husband and wife.

Marriage continues to have a special status, and carries with it a higher expectation of confidentiality within the relationship than other, more transient, relationships². Matrimonial confidences will be protected even after divorce³ unless both parties have assented to making their private lives public⁴. The implied obligation of confidence is a concomitant of marriage and remains enforceable even where the party seeking to restrain publication has published limited details and does not come with 'clean hands', provided that the 'balance of perfidy' is in that party's favour, the claimant's publication being less pernicious than that proposed or published by the defendant⁵. A spouse's infidelity does not negate entitlement to protection for past confidences⁶. In view of the number of persons likely to be interested in disclosures, the extent of an injunction may differ from that used to protect other forms of confidence⁶.

1 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545. See also *Barrymore v News Group Newspapers Ltd* [1997] FSR 600 (confidences about a marriage that have been disclosed in the context of a homosexual relationship are capable of being protected by the law of confidence).

2 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611.

3 *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA.

4 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 330, [1965] 1 All ER 611 at 625 per Ungoed-Thomas J.

5 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 at 331, [1965] 1 All ER 611 at 626. However, a claimant cannot claim protection for details of his own recent infidelity by imputing an interest to his spouse and family

in being protected from those details, since this is not a matter for the court: *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545.

6 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255-256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 643, HL.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/436. Obligations of confidence in other social or sexual relationships.

436. Obligations of confidence in other social or sexual relationships.

The courts recognise the extensive range of relationships that exist outside lawful marriage and may protect confidences disclosed within them¹. However, the fact that a sexual relationship occurs outside marriage may be a material factor where the alleged intrusion consists of information relating to such a relationship and one of the parties wishes to report it to a third party². An express agreement to maintain confidentiality in regard to a lesbian relationship is enforceable³.

Although the court will not give effect to an agreement relating to 'grossly immoral' conduct, the absence of a generally accepted moral code makes it difficult to identify such conduct and, indeed, 'there is no common view that sexual conduct of any kind between consenting adults is grossly immoral'⁴. If parties encourage publicity for what otherwise would be their private lives, protection will not be extended to them⁵.

1 *A v B plc* [2002] EWCA Civ 337 at [11](xi), [2003] QB 195 at [11](xi), [2002] 2 All ER 545 at [11](xi). See also *Stephens v Avery* [1988] Ch 449 at 455, [1988] 2 All ER 477 at 482 per Browne-Wilkinson V-C: there is nothing to support the view that information relating to sexual conduct cannot be the subject matter of a duty of confidentiality.

2 *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545. The right to freedom of expression afforded by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (ECHR) art 10(1) produces an acute conflict with the right to confidentiality in this situation: *A v B plc* supra. See also *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 398 (a relationship which subsisted only during the claimant's visit to a brothel did not bear the quality necessary to protect confidences, but the publication of photographs would breach the Press Complaints Commission's Code of Practice, since they were likely to have been procured for the purposes of blackmail); and para 418 ante. As to the Press Complaints Commission and the Code of Practice see PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) para 464; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 449.

3 *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477.

4 *Stephens v Avery* [1988] Ch 449 at 453, [1988] 2 All ER 477 at 480. See also *Khashoggi v Smith* (1980) 124 Sol Jo 149, CA. It has been suggested that the mere existence of a homosexual relationship does not raise a duty of confidence between the parties or as against third parties (see *M and N v MacKenzie and News Group Newspapers Ltd* (18 January 1988, unreported)); but this point was expressly left open in *Stephens v Avery* supra at 456 and 482.

5 *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA; *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA. See, however, *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224; and para 437 post.

UPDATE

436 Obligations of confidence in other social or sexual relationships

NOTE 5--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/437. Public figures.

437. Public figures.

Although a public figure must expect closer scrutiny arising from legitimate public interest in even trivial details, he or she is entitled to have privacy protected in appropriate circumstances¹. Such circumstances would include the publication of private facts that a fair-minded person would consider it offensive to disclose². However, protection would not be afforded where a public figure has chosen to make untrue pronouncements about his or her private life and the press seeks to publish facts as a corrective³. Also, a high-profile media personality who actively seeks publicity for what might otherwise have remained private will not be protected⁴.

1 *A v B plc* [2002] EWCA Civ 337 at [11](xii), [2003] QB 195 at [11](xii), [2002] 2 All ER 545 at [11](xii). See also *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch), [2003] NLJR 595 (photographic representation of the wedding of two celebrities had the quality of confidence about it, being characterised either as a commercial confidence or as a hybrid kind in which elements had become commercial that would otherwise have been merely private).

2 *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224. There is no public interest in the finances of a pop star: *John Reid Enterprises v Peil* [1999] EMLR 675.

3 *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.

4 *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA; *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA. See also *Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 398 (the fact that a public figure authorises the release of photographs for publicity purposes does not deny him grounds for restraining the publication of other photographs of a wholly different nature).

UPDATE

437 Public figures

NOTE 1--*Douglas*, cited, reported sub nom *Douglas v Hello! Ltd (No 3)* at [2003] 3 All ER 996. See also *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481, [2008] All ER (D) 70 (May) (infant of public figure; intrusive media attention; arguable that infant had reasonable expectation of privacy in his own right).

NOTES 2, 3--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(ii) Personal Confidences/438. Miscellaneous aspects of personal privacy.

438. Miscellaneous aspects of personal privacy.

Almost every aspect of private life may be covered by obligations of confidence, provided that the basic requirements for protection¹ are present and no rules of law or public policy are infringed².

1 As to the basic requirements for protection see para 410 ante.

2 *A-G v Barker* [1990] 3 All ER 257, CA (lifelong and worldwide ban on revealing details of employers' private lives upheld since it did not restrict future employment). See *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA; and see also the authorities cited in para 433 notes 5-7 ante.

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(iii) Confidences disclosed in the Context of a Professional Relationship

A. PROFESSIONAL RELATIONSHIPS RELATING TO HEALTH

439. In general.

The relationship of doctor and patient is one to which confidence attaches as a necessary or traditional incident¹ in order to ensure that patients make frank disclosure when seeking diagnosis and treatment². The General Medical Council³ has issued rules which, whilst not carrying statutory authority⁴, indicate matters which might lead to disciplinary proceedings under the General Medical Council's statutory powers. To reinforce the general obligation of confidence the General Medical Council sets out certain general principles to apply in all circumstances⁵. Statute and subordinate legislation also delimit, in part, the obligation of confidence⁶. In addition, the Health and Social Care Act 2001 provides for the making of regulations which govern the disclosure of information for specified purposes in the absence of consent but with due regard to the general obligation of confidence⁷.

1 *Wyatt v Wilson* (1820) unreported (cited in *Prince Albert v Strange* (1849) 1 Mac & G 25 at 46 per Lord Cottenham); *Kitson v Playfair* (1896) Times, 28 March; *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417-418, DC; *Goddard v Nationwide Building Society* [1987] QB 670 at 685, [1986] 3 All ER 264 at 271, CA; *X v Y* [1988] 2 All ER 648 at 656; *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 177, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 595, CA, per Donaldson MR, and at 255 and 639, HL, per Lord Keith of Kinkel. Confidence may be waived by the patient and disclosure is not then a breach: *C v C* [1946] 1 All ER 562.

2 *X v Y* [1988] 2 All ER 648; *W v Egdell* [1990] Ch 359 at 423, [1990] 1 All ER 835 at 851, CA. However, while there is a clear public interest in preserving the confidentiality of medical records, that could not be regarded in itself as an overriding requirement to prevent disclosure without examining the facts of any particular case: *Mersey Care National Health Service Trust v Ackroyd* [2003] EWCA Civ 663, (2003) 147 Sol Jo LB 595. As to the right to freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms art 10 see para 418 ante. As to disclosure of a journalistic source see para 475 post.

3 As to the General Medical Council see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 13 et seq.

4 *W v Egdell* [1990] Ch 359 at 412, [1990] 1 All ER 835 at 843, CA, per Sir Stephen Brown P. Since the Medical Act 1969 (repealed) introduced a further range of penalties, conduct once not regarded as infringing professional standards may now be so treated: *McCandless v General Medical Council* [1996] 1 WLR 167, (1995) Times, 12 December, PC.

5 The essential elements of standards, practice and care are set out in the General Medical Council publication *Good Medical Practice* (3rd Edn, 2000); and issues of confidentiality and data protection specifically are addressed in *Confidentiality: Protecting and Providing Information* (2000).

6 Data protection legislation, in particular, has an effect on the obtaining and use of personal data, especially sensitive personal data, by medical professionals: see para 510 post. See also the provisions relating to the possible exemption from, or modification of, provisions for data relating to a person's physical or mental health (see para 548 post); provisions relating to health and safety at work (see head (5) to para 549 post); and special provisions for providing access to confidential patient information (see paras 577-578 post).

7 See the Health and Social Care Act 2001 s 60, and regulations made thereunder; and paras 577-578 post.

UPDATE

439 In general

NOTE 2--*Mersey Care*, cited, reported at [2003] EMLR 820.

NOTE 7--2001 Act s 60 repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4. See now National Health Service Act 2006 s 251.

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440. Doctors' obligation of confidence to patient.

A doctor is under an obligation of confidence to his patient with regard to personal information acquired for the purpose of treatment, and must not disclose it to others, unless the patient consents or unless the doctor can justify the disclosure in the absence of consent¹. The doctor is charged with making sure that information is effectively protected against improper disclosure at all times and must ensure that anyone to whom personal information is disclosed is properly authorised to receive it and understands that it is given to them in confidence². Disclosures must be kept to the minimum necessary but, if a doctor does make a disclosure, he must be prepared to justify his decision³.

Generally, patients should be kept informed about disclosures of information and give their consent wherever this is possible. The patient's consent is not usually required for sharing personal information within the health care team (but the patient must be made aware that this will happen) or for such matters as the obtaining of X-ray photographs or for the preparation of correspondence relating to treatment to which the patient has agreed⁴. Where information is to be shared with others providing care outside the health care team, the patient's wishes are to be respected, except where this would put others at risk of death or serious harm, or where circumstances arise which prevent a patient being informed, for example in a medical emergency, when relevant information should be disclosed promptly to those providing the care⁵. Special considerations apply when a doctor assesses a patient for a third party⁶, and disclosures without the patient's consent to employers, insurance companies, or any other third party, can be justified only in exceptional circumstances⁷.

Even where the doctor judges that a patient cannot be identified from a disclosure, consent should still be sought; and, while anonymised data from medical records may prove useful for purposes other than medical treatment⁸, in this context also, the patient's express consent

must be obtained where identifiable data are used⁹. Where medical research projects depend upon using information or samples whose subjects cannot effectively be rendered anonymous, and where it is not practicable to seek the patients' consent, the doctor must refer the matter to the research ethics committee which will make a judgment as to where the balance lies between the public interest in the research against the patient's right to confidentiality¹⁰.

The death of a patient may modify, but does not terminate, the doctor's duty of confidence¹¹. Where a conflict of interest arises between parties affected by the patient's death, information must be released either in accordance with the Access to Health Records Act 1990 or with the informed consent of those lawfully entitled to deal with the person's estate¹².

1 See the General Medical Council publication *Confidentiality: Protecting and Providing Information* (2000). Confidence may be waived by the patient and disclosure is not then a breach: *C v C* [1946] 1 All ER 562. In Canada, a patient who sues a doctor waives confidentiality: *Hay v University of Alberta Hospital* [1991] 2 Med LR 204. As to the authority of, and weight to be accorded to, guidance from the General Medical Council see para 439 ante. The guidance provided by the General Medical Council on confidentiality also serves to ensure a doctor's compliance with other legal requirements eg under the Data Protection Act 1998: see para 503 et seq post.

A doctor must seek consent to disclosure whenever possible (see *Confidentiality: Protecting and Providing Information* (2000) para 1); this is mandatory where disclosure will have personal consequences for the patient (para 14) and advised even where such consequences are unlikely to occur (para 15; but see text and notes 8-9 infra). Consent is defined in the guidance as agreement to an action based on knowledge of what the action involves and its likely consequences. However, where a patient's ability to give consent is impaired by immaturity, illness or mental incapacity, effort must be made to involve an appropriate person in any decision to disclose relevant information to a third party, but the information may be disclosed in any event to an appropriate authority and without the patient's consent, if this is considered essential in the medical interests of the patient: see para 38. If a patient appears to the doctor to be neglected or abused and unable to give consent to disclosure of the relevant information, the doctor must inform an appropriate person or statutory agency, where this is in the patient's best interests: see para 39.

See also MEDICAL PROFESSIONS.

2 See *ibid* paras 2, 9, 17, Appendix 1 (electronic processing).

3 See *ibid* para 1.

4 See *ibid* paras 7, 8.

5 See *ibid* paras 8, 10.

6 A doctor might be asked to examine a subject or to disclose information from existing records for a third party to whom the doctor has contractual obligations such as occur in the provision of occupational health services or medical care, in work with insurance companies or with agencies which assess benefits, or in his work as a police surgeon, in the armed forces, or in the prison service: see *ibid* paras 33, 34.

7 See *ibid* para 35. The Access to Medical Reports Act 1988 entitles patients to see reports written about them before they are disclosed, in some circumstances.

8 'Anonymised' information about patients may be used to protect public health (including monitoring and epidemiology), to undertake clinical or medical research and audit, to teach or train medical staff and students, and in the administration and planning of health services. 'Anonymised data' is defined in the guidance as data from which the patient cannot be identified by the recipient of the information. As to the release of 'anonymous' patient information for marketing research purposes see *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] 1 All ER 786, CA (doctor's obligation of confidentiality not breached if prescription information which does not identify the patient is disclosed to a third party for marketing research purposes, even without the patient's permission).

9 See *Confidentiality: Protecting and Providing Information* (2000) para 15. Where information is needed for purposes other than treatment of the patient (see note 8 supra), and where it is considered not practicable either to obtain consent to disclosure or to anonymise the data, necessary disclosures of identifiable data may be made without the patient's consent so long as the patient has received prior notification of the possibility that this may happen: see para 16.

10 See *ibid* para 31.

11 See *ibid* para 40. The extent of modification will depend on the circumstances, but disclosures may be considered to assist an inquest or fatal accident inquiry, to assist clinical audit, public health surveillance, education or research, and to enable the issuing death certificates in accordance with legal requirements: see para 41. See para 428 ante.

12 See *ibid* para 42; the Access to Health Records Act 1990 s 4(3); and para 428 ante.

UPDATE

440 Doctors' obligation of confidence to patient

NOTE 11--See *Lewis v Secretary of State for Health* [2008] EWHC 2196 (QB), [2008] All ER (D) 90 (Sep) (public interest in disclosure of material outweighed public interest of maintaining confidentiality of medical records and information).

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441. Mandatory disclosure where patient's consent is not a prerequisite.

Disclosures may be made in the public interest where disclosure is essential to protect the patient, or third parties, from risk of death or serious harm¹. Such circumstances may arise: (1) where a colleague, who is also a patient, is placing patients at risk as a result of illness or other medical condition²; or (2) where a patient continues to drive, against medical advice, when unfit to do so³; or (3) where a disclosure may assist in the prevention or detection of a serious crime⁴. Where third parties are involved, the doctor must disclose information promptly to an appropriate person or authority, even where it is not practicable to obtain consent⁵.

Certain statutes and statutory instruments impose obligations of disclosure in relation to medical information⁶. A proportionate disclosure of information may be made on the direction of a judge, presiding officer of the court, coroner or other similar officer for the purpose of proceedings, but the consent of the patient is required for disclosure to a third party (even to one involved in the court service or police service) if there is no court order⁷. Personal information may be disclosed, upon request, to assist a statutory regulatory body for any of the health care professions⁸, where such a request is considered necessary in the interests of justice and for the safety of other patients⁹.

1 See the General Medical Council publication *Confidentiality: Protecting and Providing Information* (2000) paras 14, 36; *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA; *R v Crozier* [1991] Crim LR 138, CA; *C (A Minor) (Evidence: Confidential Information)* [1991] FCR 553, [1991] 2 FLR 478, CA (in adoption proceedings, public interest and the best interests of the child prevailed over confidentiality of the mother's medical records); *Re L (Minors) (Police Investigation: Privilege)* (1995) Times, 25 April. The test of public interest involves a balance between the benefits to an individual or to society of the disclosure and the patient's interest in keeping the information confidential: see *Confidentiality: Protecting and Providing Information* (2000) paras 18, 19, 36. The doctor's application of this test may be subject to review by the General Medical Council and ultimately by the courts: para 20. As to the authority of, and weight to be accorded to, guidance from the General Medical Council see para 439 ante.

2 See *ibid* para 37. Further guidance is available from the General Medical Council: see *Serious Communicable Diseases* (1997); and para 442 post.

3 See *Confidentiality: Protecting and Providing Information* (2000) para 37. In such circumstances, the doctor must disclose relevant information to the medical adviser of the Driver and Vehicle Licensing Agency without delay: see Appendix 2. As to drivers' licences see ROAD TRAFFIC vol 40(1) (2007 Reissue) para 442 et seq.

4 See *ibid* para 37; *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA (public interest in safety overrode public interest in confidentiality where mental patient was considered too dangerous by a psychiatrist for early release from prison); *R v Crozier* [1991] Crim LR 138, CA. Serious crimes, in this context, are those that put someone at risk of death or serious harm, and will usually be crimes against the person, such as abuse of children: see *Confidentiality: Protecting and Providing Information* (2000) para 37.

5 See *ibid* para 36. See also *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA; *R v Crozier* [1991] Crim LR 138, CA; and the text and note 4 supra.

6 See the Abortion Act 1967 s 2 (as amended) and the Abortion Regulations 1991, SI 1991/499 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 209); the National Health Service Act 1977 s 124 (as amended) and the National Health Service (Notification of Births and Deaths) Regulations 1982, SI 1982/286 (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 616); the Police and Criminal Evidence Act 1984 ss 9-12 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 875); the Road Traffic Act 1988 s 172 (as substituted) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) para 1026); the Terrorism Act 2000 s 19 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 394); and the Public Health (Control of Disease) Act 1984 s 11 (as amended) and the Public Health (Infectious Diseases) Regulations 1988, SI 1988/1546 (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 894).

7 See *Confidentiality: Protecting and Providing Information* (2000) paras 44, 45.

8 Eg the General Medical Council, the General Dental Council, or the Council for Nursing and Midwifery.

9 See *Confidentiality: Protecting and Providing Information* (2000) para 46.

UPDATE

441 Mandatory disclosure where patient's consent is not a prerequisite

NOTES--Certain persons or endorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 6--National Health Service Act 1977 s 124 now National Health Service Act 2006 s 269, National Health Service (Wales) Act 2006 s 200. SI 1982/286 amended: SI 2002/2469.

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442. Confidentiality relating to patients with serious communicable diseases and sexually transmitted diseases.

Specific guidance applies to the disclosure of information about serious communicable diseases¹. A doctor may disclose information about an infected patient with his consent in order to further his treatment in the most appropriate manner or, without his consent, in order to protect any other person from risk of death or serious harm². A doctor or other health care worker being treated for a serious communicable disease is entitled to the same confidentiality as other patients³. However, a doctor who has good reason to believe that a fellow health care

worker has or may have such a disease and is placing patients at risk, must inform the health care worker's employing authority or the relevant regulatory body⁴.

There is a specific duty of confidence in relation to patients with sexually transmitted diseases⁵. Every Strategic Health Authority, NHS Trust and Primary Care Trust⁶ must take all necessary steps to secure that any information obtained by the officers of the authority or trust, with respect to persons examined or treated for any sexually transmitted disease, capable of identifying an individual, must not be disclosed except: (1) for the purpose of communicating that information to a medical practitioner, or to a person employed under the direction of a medical practitioner in connection with the treatment of persons suffering from such disease or the prevention of its spread; and (2) for the purpose of such treatment or prevention⁷.

1 See the General Medical Council publication *Serious Communicable Diseases* (1997). The term 'serious communicable disease' means any disease which may be transmitted from human to human and which may result in death or serious illness. It particularly concerns, but is not limited to, infections such as HIV (human immunodeficiency virus), AIDS (acquired immune deficiency syndrome), tuberculosis and hepatitis B and C. As to the authority of, and weight to be accorded, guidance from the General Medical Council see para 439 ante.

2 See *ibid* paras 19, 22.

3 See *ibid* para 34. See *X v Y*[1988] 2 All ER 648 (newspaper attempting to induce health authority to disclose confidential medical records showing that doctors were suffering from AIDS); *H (A Healthcare Worker) v Associated Newspapers Ltd, H (A Healthcare Worker) v N (A Health Authority)* [2002] EWCA Civ 195, [2002] EMLR 425 (the protection of the identity of an HIV positive healthcare worker justified the use of initials only to identify the worker and the health authority, but details of his speciality need not be withheld). Clinical confidentiality is not necessarily breached when a health authority conducts a 'look back' exercise (ie assessing which former NHS patients of a HIV positive healthcare worker might be at risk) so long as patient records are used for reasonable purposes only and further disclosure of them by the health authority is banned without the worker's permission or the permission of the court: *H (A Healthcare Worker) v Associated Newspapers Ltd, H (A Healthcare Worker) v N (A Health Authority)* supra.

4 See *Serious Communicable Diseases* (1997) para 35. The health care worker's consent should be sought but it is not a prerequisite to making such a disclosure: see para 35.

5 See the National Health Service (Venereal Diseases) Regulations 1974, SI 1974/29 (as amended); and the text and notes 6-7 infra.

6 See *HEALTH SERVICES* vol 54 (2008) PARA 94 et seq.

7 National Health Service (Venereal Diseases) Regulations 1974, SI 1974/29, reg 2 (modified by SI 1990/1525; and amended by SI 2002/2469).

UPDATE

442 Confidentiality relating to patients with serious communicable diseases and sexually transmitted diseases

NOTE 7--A corresponding amendment has been to SI 1974/29 reg 2 in relation to Wales: SI 2009/1824.

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443. The making and use of visual and audio recordings of patients.

Specific guidance applies to all types of audio and visual recordings of patients, carried out for any purpose¹. The guiding principle is that the interests of the patient take precedence over any such recording². When making recordings, the doctor must inform the patient about the purpose of any recording, must seek his permission to make it, and obtain his informed and voluntary consent for any use or disclosure³. Special consideration should be given to patients for whom mental disability or mental or physical illness may affect their ability to give any such consent, and to children who may lack sufficient understanding to give their permission⁴.

Any recordings that are made must be stored appropriately under secure arrangements⁵; and any disclosure must not, in its scope, breach the terms of any consent given⁶.

Specific permission is not required to make images taken from pathology slides, from X-rays, laparoscopic images, images of internal organs, or ultrasound images or to use such images for any purpose, provided that the recordings are effectively made anonymous beforehand⁷. Apart from these exceptions, the doctor must seek permission from the patient to make any recording, explaining that a recording will be made, and documenting in the medical notes that permission has been given, unless exceptional circumstances apply⁸. Recordings made for clinical purposes form part of the medical record and are subject to the general guidance as to patient confidentiality⁹. Recordings made for the training or assessment of doctors, or for audit, research or medico-legal reasons may be made only with the patient's informed consent¹⁰. Once such a recording has been made, patients may see the recording in the form in which it will be shown, and may vary or withdraw their consent to the use of the recording¹¹. Any withdrawal of consent means that the recording cannot be used and must be erased as soon as possible¹². Recordings may be used only for the purpose for which patients have given consent, and are subject to the same arrangements against improper disclosure as other medical records¹³.

The considerations set out above apply also to recordings for use in publicly accessible media (including medical journals), except that written permission is required for such use¹⁴. Appropriate permission from the doctor's employing or contracting body (or the organisation in which the patients are being treated) is required before any arrangements are made for external individuals or organisations to film patients in a health care setting¹⁵. Doctors who are involved in any way with recording patients for television or other public media must satisfy themselves that the patients' permission has been properly obtained, and that patients understand that, once they have agreed to the recording, they may not be able to withhold their consent for its subsequent use¹⁶.

1 See the General Medical Council publication *Making and Using Visual and Audio Recordings of Patients* (2002). For these purposes, 'recording' means originals or copies of video and audio recordings, photographs and other visual images of patients, but does not include pathology slides containing human tissue (as opposed to any image of such a slide). As to the authority of, and weight to be accorded to, guidance from the General Medical Council see para 439 ante. CCTV recordings of public areas in hospitals and surgeries are subject to the general guidance on data protection issued by the Information Commissioner: see the CCTV code of practice (2000); and para 518 note 9 post.

2 *Making and Using Visual and Audio Recordings of Patients* (2002) Pt 1.

3 *Ibid* Pt 1.

4 *Ibid* Pt 1. However, children under 16 may give consent where they are assessed to have the capacity and understanding to do so: Pt 1.

5 *Ibid* Pt 1.

6 *Ibid* Pt 1.

7 *Ibid* Pt 2. Nevertheless, the fact that such recordings will be made should be explained to patients beforehand: Pt 2.

8 Ibid Pt 3A. Recordings made during a hospital post-mortem examination require permission from a close relative or carer if the deceased may be identifiable, unless the death is the subject of a medico-legal investigation, in which case the proposed recording should be discussed with the coroner who has authorised the investigation: Pt 3A. Covert surveillance of a patient should be conducted only after consultation with a colleague and may need to be undertaken by the relevant authorities: Pt 3A.

Where recordings are made of emergency treatment or of unconscious patients, prior permission is not required but the recording must stop if a relative objects; and the subsequent use of such recordings is subject to the patient's consent (or to the consent of a relative if the patient has died): Pt 3B.

9 Ibid Pt 3A. As to the general guidance regarding patient confidentiality see paras 440-441 ante.

10 Ibid Pt 3A. Recordings which were made for teaching purposes prior to 1997 and from which the patient is not identifiable may be used without explicit consent but should be replaced as soon as possible: Pt 3A.

11 Ibid Pt 3A.

12 Ibid Pt 3A.

13 Ibid Pt 3A. As to the general guidance regarding patient confidentiality see paras 440-441 ante.

14 Ibid Pt 3C.

15 Ibid Pt 3C.

16 Ibid Pt 3C. Doctors must put the patients' interests above the purpose of any recording and should be particularly vigilant in recordings of those who are unable to give permission themselves: Pt 3C.

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444. Evidential privilege of doctors.

A doctor does not enjoy any evidential privilege similar to legal professional privilege¹ and can therefore be compelled to disclose in court information covered by medical confidentiality. However, he may seek the protection of the court which may, at its discretion, allow him to decline to answer².

1 As to legal professional privilege see para 453 post; CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

2 *Hunter v Mann* [1974] QB 767 at 775, [1974] 2 All ER 414 at 419, DC, per Lord Widgery CJ. See also *Duchess of Kingston's Case* (1776) 20 State Tr 355; *R v Gibbons* (1823) 1 C & P 97; *Wheeler v Le Marchant* (1881) 17 ChD 675 at 681; *Garner v Garner* (1920) 36 TLR 196.

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445. Patients below the age of 16.

A person over the age of 16 is entitled to full confidentiality, but in the case of patients below that age, if the doctor is not satisfied that the patient has sufficient maturity and understanding to appreciate what is involved in a medical treatment or procedure, the doctor may inform the patient's parents or guardian, provided that the doctor informs the patient that this is being done¹. If the doctor is satisfied that the patient has sufficient maturity and understanding then full confidentiality applies².

1 See *Gillick v West Norfolk and Wisbech Area Health Authority and DHSS* [1986] AC 112, [1985] 3 All ER 402, HL.

2 *Gillick v West Norfolk and Wisbech Area Health Authority and DHSS* [1986] AC 112 at 174, 189-190, 195, [1985] 3 All ER 402 at 413, 424, 427-428, HL.

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446. Access to medical records.

Legislation concerning data protection and access to medical reports and records contains provisions designed to safeguard confidentiality¹.

Access to medical records can be obtained by disclosure² but the order to disclose such documents may direct that disclosure be limited to legal or medical advisers³.

1 As to the control of patient information and the establishment of the Patient Information Advisory Group see the Health and Social Care Act 2001; the Patient Information Advisory Group (Establishment) Regulations 2001, SI 2001/2836; and paras 577-578 post. See also the Data Protection Act 1998, and subordinate legislation made thereunder; and para 503 et seq post. See further the Access to Medical Reports Act 1988; the Access to Health Records Act 1990; the Access to Health Records (Control of Access) Regulations 1993, SI 1993/746; and MEDICAL PROFESSIONS vol 30(1) (Reissue) paras 215-216.

2 As to disclosure generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

3 See the Supreme Court Act 1981 s 34(2); and CIVIL PROCEDURE vol 11 (2009) PARA 550. See also *McIvor v Southern Health and Social Services Board, Northern Ireland* [1978] 2 All ER 625, [1978] 1 WLR 757, HL; *A Health Authority v X* [2001] EWCA Civ 2014, [2002] 2 All ER 780 (a judge is entitled to exercise his discretion to impose conditions on orders for disclosure of medical records to a health authority).

UPDATE

446 Access to medical records

TEXT AND NOTES--Access to medical records may involve consideration of the individual's right to private life: see *Brent LBC v N (Foster Carers)* [2005] EWHC 1676 (Fam), [2006] 1 FLR 310.

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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447. Information relating to human fertilisation and embryology.

The Human Fertilisation and Embryology Authority¹ is under a duty to maintain a register² of relevant information, and the Authority may not disclose any information contained within that register or any other information acquired by the Authority in circumstances requiring it to be held in confidence³.

The Authority may make disclosure in certain circumstances in accordance with the statutory provisions⁴.

1 As to the Human Fertilisation and Embryology Authority see MEDICAL PROFESSIONS vol 30(1) (Reissue) para 78 et seq.

2 As to the register see the Human Fertilisation and Embryology Act 1990 s 31; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 107.

3 See *ibid* s 33 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 109.

4 See *ibid* ss 31, 32, 34, 35; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) paras 108, 111.

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448. Dentists.

Dentists, as professional persons, appear to be under obligations of confidence similar to those of doctors¹. Dentists who disclose to third parties, without the patient's permission, information about a patient acquired in a professional capacity may be charged with serious professional misconduct, although there may be circumstances in which the public interest outweighs the dentist's duty with regard to confidentiality and in which disclosure would be justified². Dentists' obligations of confidence extend to other members of the dental team³. For the purposes of legislation relating to access to health records, dentists, together with doctors, nurses and others professionally associated with medicine, are 'health professionals'⁴.

1 'In common with other professional men, for instance a priest and there are of course others, the doctor is under a duty not to disclose without the consent of his patient, information which the doctor has gained in his professional capacity': *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417, DC, per Boreham J.

2 See *Maintaining Standards--Guidance to Dentists on Professional and Personal Conduct* (1997, revised 2000) clause 3.5. A dentist who considers disclosure to be necessary without consent must consult a defence or professional organisation or other appropriate adviser: see clause 3.5.

3 See *ibid* clause 3.5.

4 'Health professional' has the same meaning as in the Data Protection Act 1998 s 69 (as amended) (see para 450 post): Access to Health Records Act 1990 s 2(1) (amended by the Data Protection Act 1998 s 74(1), Sch 15 para 11). See MEDICAL PROFESSIONS vol 30(1) (Reissue) para 216.

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449. Nurses, midwives and health visitors.

Registered nurses, midwives and health visitors, as professional persons, appear to be bound by obligations of confidence similar to those which bind doctors and dentists¹. Those covered by the Nursing and Midwifery Council Code of Professional Conduct must treat information about patients and clients as confidential and use it only for the purposes for which it was given². They must guard against breaches of confidentiality and make disclosure outside the team involved in the delivery of care³ only with consent⁴, or where required to do so by law or by the order of a court or where disclosure can be justified in the wider public interest⁵. For the purposes of legislation giving access to medical records, nurses and midwives are 'health professionals'⁶.

1 See *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417, DC.

2 See the Nursing and Midwifery Council Code of Professional Conduct (2002) clause 5.1. The Nursing and Midwifery Council also supervises health visitors.

3 It is considered impractical to obtain consent every time information needs to be shared within the team and it is considered sufficient for these purposes that patients and clients are made to understand that some information may be made available to other members of the team involved in the delivery of care: see *ibid* clause 5.1.

4 When a patient or client is considered incapable of giving permission, the registered nurse, midwife or health visitor must consult relevant colleagues: see *ibid* clause 5.2.

5 See *ibid* clause 5.3.

6 As to the meaning of 'health professional' see para 448 note 4 ante.

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450. Other health professionals.

Other members of the health professions appear to be bound by obligations similar to those for doctors, dentists and nurses¹.

In addition to doctors², dentists³ and registered nurses and midwives⁴, the following are 'health professionals' for the purposes of legislation giving access to health records⁵: (1) a registered optician⁶; (2) a registered pharmaceutical chemist⁷; (3) a registered osteopath⁸; (4) a registered

chiropractor⁹; (5) any person who is registered as a member of a profession to which the Health Professions Order 2001¹⁰ for the time being extends¹¹; (6) a clinical psychologist, child psychotherapist or speech therapist¹²; (7) a music therapist employed by a health service body¹³; and (8) a scientist employed by such a body as head of a department¹⁴.

1 See *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417, DC. See also *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224 (in circumstances where it is legitimate to publish that the claimant is a drug addict and is receiving treatment, it is not offensive to publish the additional fact that the treatment consisted of attendance at counselling meetings; such information is distinguishable from clinical details of a medical condition or its treatment which are well recognised as confidential information). As to the meaning of 'health professional' see para 448 note 4 ante.

2 See the Data Protection Act 1998 s 69(1)(a). As to doctors see para 439 et seq ante.

3 See *ibid* s 69(1)(b). As to dentists see para 448 ante.

4 See *ibid* s 69(1)(e) (amended as from the date notified in the London Gazette by the Nursing and Midwifery Order 2001, SI 2002/253, art 54(3), Sch 5 para 14). As to registered nurses and midwives see para 449 ante.

5 See the Data Protection Act 1998 s 69; the Access to Health Records Act 1990 s 2(1) (as amended); and MEDICAL PROFESSIONS vol 30(1) (Reissue) para 216.

6 See the Data Protection Act 1998 s 69(1)(c).

7 See *ibid* s 69(1)(d). A pharmacist does not breach his obligation of confidentiality if, without a patient's permission, he discloses to a third party, for marketing research purposes, prescription information which does not identify the patient; the patient has no property rights to the prescription or to the information contained in it: *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] 1 All ER 786, CA.

8 See the Data Protection Act 1998 s 69(1)(f).

9 See *ibid* s 69(1)(g). See *JD v Ross* [1998] NZFLR 951 (the disclosure to social services by a psychologist of relevant information regarding a child obtained from a discussion with the child's parent is in the public interest; disclosure ought not to be made of incidental discussions regarding the parent).

10 Ie the Health Professions Order 2001, SI 2001/254: see MEDICAL PROFESSIONS.

11 See the Data Protection Act 1998 s 69(1)(h) (amended by the Health Professions Order 2001, SI 2001/254, art 48(3), Sch 4 para 7).

12 See the Data Protection Act 1998 s 69(1)(i).

13 See *ibid* s 69(1)(j).

14 See *ibid* s 69(1)(k).

UPDATE

450 Other health professionals

NOTE 1--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

NOTE 4--Date notified as 1 August 2004: London Gazette, 21 July 2004.

NOTE 5--1998 Act s 69 further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 191.

TEXT AND NOTE 7--1998 Act s 69(1)(d) amended: SI 2007/289.

TEXT AND NOTE 12--In head (6) references to speech therapist and clinical psychologist omitted: 1998 Act s 69(1)(i) (amended by SI 2003/1590, SI 2009/1182).

TEXT AND NOTE 13--1998 Act s 69(1)(j) repealed: SI 2003/1590.

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B. OTHER PROFESSIONAL RELATIONSHIPS

451. Clergy.

The relationship between priest and penitent has been held to be one of professional confidence¹. The obligation of confidence may extend to all pastoral work of the clergy, for example conciliation², but the authorities appear inconsistent as to the circumstances in which the obligation of confidence may be overruled and, therefore, how far it extends to the pastoral work of the clergy generally³.

1 *Goddard v Nationwide Building Society* [1987] QB 670 at 685, [1986] 3 All ER 264 at 271, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 177, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 595, CA, per Donaldson MR, and at 255 and 639, HL, per Lord Keith of Kinkel. See also *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417, DC; *Stephens v Avery* [1988] Ch 449 at 455, [1988] 2 All ER 477 at 482; *W v Egdell* [1990] Ch 359 at 419, [1990] 1 All ER 835 at 848, CA.

2 See *Henley v Henley* [1955] P 202, [1955] 1 All ER 590n (vicar's conversation in his character as 'conciliator' with party to subsequent divorce is privileged).

3 *R v Hay* (1860) 2 F & F 4 (priest who received watch in confessional required to say from whom he received it, but not what was said between him and the giver); *Broad v Pitt* (1828) 3 C & P 518; *R v Griffin* (1853) 6 Cox CC 219; *Ruthven v De Bour* (1901) 45 Sol Jo 272; but see *Wheeler v Le Marchant* (1881) 17 ChD 675 at 681 per Jessel MR ('the principle protecting confidential communications is of a very limited character ... communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected'); *Normanshaw v Normanshaw* (1893) 69 LT 468 (clergyman called as witness on behalf of petitioner objected to disclosing content of conversation; objection disallowed); *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413, [1984] 1 WLR 892 at 897, CA. As to the extent of this privilege in Irish law see *Cook v Carroll* [1945] IR 515.

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452. Barristers.

The relationship of barrister and client is one to which confidence attaches as a necessary or traditional incident¹. This obligation of confidence is codified in the Code of Conduct of the Bar of England and Wales².

1 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 177, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 595, CA, per Donaldson MR, and at 255 and 639, HL, per Lord Keith of Kinkel; *Carter v Palmer* (1839) 1 Dr & W 722 (affd (1842) 8 Cl & Fin 657, HL). As to legal professional privilege see para 453 post; CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq. 972; CRIMINAL LAW, EVIDENCE AND

PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

Data protection legislation has an effect also on the obtaining and use of personal data, especially sensitive personal data, by legal professionals: see para 510 post.

2 See the Code of Conduct of the Bar of England and Wales; and LEGAL PROFESSIONS vol 66 (2009) PARA 1201.

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453. Solicitors.

As with barristers¹, the relationship of solicitor and client is one to which confidence attaches as a necessary or traditional incident². Communications between solicitor and client are also covered by legal professional privilege which protects the solicitor from being compelled to reveal professional communications³, provided they are legitimate and not made to promote fraud or crime⁴. Since solicitors are officers of the court a higher standard may be required of them than of other confidants⁵. There is no absolute rule preventing a solicitor from acting against a former client, but he may be prevented from doing so to avoid a significant risk of disclosure, or misuse of confidential information belonging to a former client, and the court should intervene unless satisfied that there is no risk of disclosure⁶.

The Law Society has formulated detailed guidance on the professional conduct of solicitors including the practical applications of the general duty of confidentiality⁷. However, subject to the protection afforded by privilege, a solicitor's duty to keep a client's confidences can be overridden in certain exceptional circumstances⁸; and a person's duty to disclose information that he knows or suspects relates to a criminal act specified under certain legislation has particular relevance to solicitors⁹.

Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court¹⁰. Where it is obvious that privileged documents from counsel acting for the other side are mistakenly sent to a solicitor he should not read them but return them¹¹. However, if the mistake would not have been obvious to a reasonable solicitor, an injunction ordering the return of the documents may be refused, and the documents may be used by the receiving party, on the basis that all privilege in the material has been lost¹².

Where a solicitor comes into possession of information relating to state security or intelligence matters to which the Official Secrets Acts 1911 to 1989 apply, the initial disclosure and any subsequent disclosure is lawful only if it has been made, or is made, in accordance with those Acts¹³.

1 See para 452 ante.

2 See LEGAL PROFESSIONS vol 66 (2009) PARA 1146. Confidentiality can be implied where it would be expected to be assumed by those involved: *Gotha City v Sotheby's* [1998] 1 WLR 114, CA (privilege not waived in relation to second defendant by earlier disclosure to first defendant). Data protection legislation has an effect also on the obtaining and use of personal data, especially sensitive personal data, by legal professionals: see para 510 post.

3 The right of confidence is enjoyed only by the client, not the solicitor; and only the client has the standing to bring an action to preserve the confidentiality of privileged communications: *Nationwide Building Society v Various Solicitors (No 2)* (1998) Times, 1 May. It has been held that legal professional privilege does

not extend to information which the client could lawfully be required to reveal: see *Re Murjani (a bankrupt)* [1996] 1 All ER 65, [1996] 1 WLR 1498. The Privy Council has held that legal professional privilege is a public interest fundamental to the administration of justice and should be overridden by competing public interests only where these are provided either expressly or by necessary implication by statute: *B v Auckland District Law Society* [2003] UKPC 38, 147 Sol Jo LB 627. As to whether the client's identity is confidential see *Conoco (UK) Ltd v The Commercial Law Practice* 1997 SLT 372, (1996) Times, 13 February, OH. As to legal professional privilege see CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146. As to data protection legislation, and legal professional privilege in disclosures required under the Data Protection Act 1998, see paras 562-563 post. See also the disapplication of the eighth data protection principle in relation to such material (see para 517 head (v) post); the exemption under the Data Protection Act 1998 for disclosures required in relation to legal proceedings (see para 554 post); the limitation placed on directions made by the Information Tribunal as to the production of documents (see para 569 post); and the exemption of communications between a professional legal adviser and his client from search and seizure under the Data Protection Act 1998 (see para 576 post).

4 See *R v Cox and Railton* (1884) 14 QBD 153, CCR; *Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35, CA. The privilege prevails over any public interest in securing relevant and admissible evidence: *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL. A client suing a solicitor waives privilege: *Kershaw v Whelan* [1996] 2 All ER 404, [1996] 1 WLR 358; and see LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

5 *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 at 840, CA, per Fletcher Moulton LJ; and see LEGAL PROFESSIONS vol 66 (2009) PARA 816.

6 *Bolkiah v KPMG* [1999] 2 AC 222, [1999] 1 All ER 517, HL. The protection of confidential information is a basis for restraining a former partner in the firm which is acting for one party in litigation from acting for another party to the litigation; but where the evidence does not show that the former partner had ever been in possession of confidential information relating to the litigation, the mere perception of impropriety is insufficient basis for intervention: *Re a Firm of Solicitors* [1997] Ch 1, [1995] FSR 783. A solicitor acting for both parties to a transaction may owe duties to each party: *Halifax Mortgage Services (formerly BNP Mortages Ltd) v Stepsky* [1996] Ch 1, [1995] 4 All ER 656. See also *Mortgage Express Ltd v Bowerman & Partners (a firm)* [1995] QB 375, [1996] 2 All ER 836, CA; and the Guide to the Professional Conduct of Solicitors Principle 15.

7 See the Guide to the Professional Conduct of Solicitors; and LEGAL PROFESSIONS vol 65 (2008) PARA 740, LEGAL PROFESSIONS vol 66 (2009) PARA 816 et seq. The solicitor's duty of confidentiality is not determined by the end of the retainer, nor by the conclusion of the particular matter on which the solicitor or the firm was engaged nor by the death of the client: Guide to the Professional Conduct of Solicitors Principle 16.01 para 3.

8 See the Guide to the Professional Conduct of Solicitors Principles 16.02, 16.07. See also *Parry-Jones v Law Society* [1969] 1 Ch 1, [1968] 1 All ER 177, CA.

9 See eg the Terrorism Act 2000 s 19 (terrorism); the Proceeds of Crime Act 2002 s 327 (money laundering); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 394; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 791. Information which a professional legal adviser has obtained in privileged circumstances is not subject to the duty to disclose: see the Terrorism Act 2000 s 19(5); the Proceeds of Crime Act 2002 ss 330, 333, 342.

10 CPR 31.20.

11 See *English and American Insurance Co Ltd v Herbert Smith* [1988] FSR 232; *Abblitt v Mills & Reeve (a firm)* (1995) Times, 25 October (when such documents were read in full by the solicitor on the instructions of his client, the solicitor was restrained by injunction from taking any further part in the proceedings); and the Guide to the Professional Conduct of Solicitors Principle 16.06.

12 *Al Fayed v Metropolitan Police Comr* [2002] EWCA Civ 780, [2002] All ER (D) 450 (May), (2002) Times, 17 June. See also the Guide to the Professional Conduct of Solicitors Principle 16.06. Any potential for public interest immunity is also lost in these circumstances. As to public interest immunity see CIVIL PROCEDURE vol 11 (2009) PARAS 574-579.

13 See the Official Secrets Acts 1911 to 1989; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 478 et seq. See also the Guide to the Professional Conduct of Solicitors Principle 16.06.

UPDATE

453 Solicitors

NOTES--*Guide to the Professional Conduct of Solicitors* (8th Edn, 1999) replaced, with effect from 1 July 2007, by the *Solicitors' Code of Conduct 2007*.

NOTE 6--It is incumbent on a claimant who seeks to restrain his former solicitor from acting in a matter for another client to establish that the solicitor is in possession of information which was confidential to the claimant and to disclosure of which he has not consented: *Winters v Mishcon de Reya* [2008] EWHC 2419 (Ch), [2008] All ER (D) 123 (Oct).

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454. Bankers.

A banker owes an obligation of confidence to his customer but this is subject to qualification both at common law and by statute¹. The duty covers information derived not only from the customer's account but also from other sources, so far as they are related to banking, as when advice is given to a customer on business matters, or decisions are taken by the bank as to the treatment of customers²; the duty may continue after the relationship ends³.

Disclosure is, however, allowed where required by: (1) compulsion of law; (2) public interest; (3) the interests of the bank; or (4) the express or implied consent of the customer⁴. A bank is not under a duty to withhold from a customer the fact that it has been required to produce his account in court, nor is it under an absolute duty to inform him of the fact, but it should use its best endeavours to inform him. There is no head of legal privilege for bank accounts and it is uncertain whether there may be an implied term or duty to object on the customer's behalf or to inform the court that disclosure is being made without the consent of the customer and whether the bank, if in breach of such a term, can claim the immunity of a witness⁵. In civil proceedings, confidential reports disclosed voluntarily by a bank to regulatory authorities relating to its private client operations are not, as a class, entitled to public interest immunity since a heavy onus lies on the person asserting a new claim to such immunity⁶. In a criminal investigation, a banker is not obliged to inform a customer of an order allowing police to inspect an account in a criminal investigation, nor is he obliged to resist such an order, although he is free to disregard a request by the police not to inform his client of the application for such an order⁷. A banker may be required by letters rogatory from a foreign court to submit to oral examination even if he is thereby required to disclose confidential advice given to a customer⁸. When, however, English law is the proper law of a banking contract⁹ and the balance of convenience is appropriate, an injunction will be granted to prevent a bank breaching confidentiality to comply with an order of a foreign court claiming excessive jurisdiction¹⁰.

1 See *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 910-922. The limits of the duty set out in *Tournier v National Provincial and Union Bank of England* supra must be determined according to common sense; material disclosed pursuant to statute is not covered by confidentiality, even though the material may have been received in confidence originally: *Christofi v Barclays Bank plc* [1998] 1 WLR 1245.

2 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, CA, per Bankes LJ, and at 485 per Atkin LJ; contra at 481 per Scrutton LJ, who excluded knowledge from other sources.

3 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 485, CA, per Atkin LJ; contra at 481 per Scrutton LJ.

4 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, CA, per Bankes LJ. The general practice among banks of replying to each other's status enquiries, being a private arrangement, did not erode the duty of confidentiality to customers, but, being concealed, was not 'notorious reasonable and certain' and consent could not be inferred as an implied term of opening an account: *Turner v Royal Bank of Scotland* [1999] 2 All ER (Comm) 664, CA.

Illustrations of head (1) in the text are revenue legislation, the Bankers' Books Evidence Act 1879, the Terrorism Act 2000 and (in relation to money laundering) the Proceeds of Crime Act 2002. As to head (3) and head (4) in the text see *Sunderland v Barclays Bank Ltd* (1938) 5 Legal Decisions Affecting Bankers 163 (where a husband took over a telephone conversation between his wife and a bank manager, and he was advised as to the reasons why the bank was refusing to meet his wife's cheques).

5 *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824, [1994] 1 WLR 1493, PC; *E/Jawhary v Bank of Credit and Commerce International SA (No 2)* [1995] 2 BCLC 581 (the duty of confidentiality is not breached if confidential information about a customer is disclosed in pursuance of an obligation to disclose in the course of proceedings).

6 *Kaufmann v Credit Lyonnais Bank* (1995) Times, 1 February. As to public interest immunity see CIVIL PROCEDURE vol 11 (2009) PARAS 574-579.

7 *Barclays Bank plc v Taylor, Trustee Savings Bank of Wales and Border Counties v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA.

8 *Re State of Norway's Application, Re State of Norway's Application (No 2)* [1990] 1 AC 723, [1989] 1 All ER 745, HL.

9 As to the proper law of the contract see CONFLICT OF LAWS.

10 *X AG v A bank* [1983] 2 All ER 464, [1983] 2 Lloyd's Rep 535.

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455. Fiduciaries' obligations of confidence.

Fiduciary relationships¹, which by their nature are relationships of good faith, involve obligations of confidence². However, a fiduciary relationship is not necessarily created through the mere receipt or misuse of confidential information, although the exchange of confidential information and restrictions on its use are possible incidents of such a relationship³. The principle that a person who has obtained confidential information from another must not use that information to the prejudice of the person who gave it applies with particular force as between a director⁴ and his company by reason of the fiduciary character of the duty owed by the one to the other⁵. The existence of a fiduciary relationship, however, does not operate to extend obligations of confidentiality to what would not otherwise be confidential⁶.

1 As to fiduciary relationships generally see EQUITY.

2 See *Baker v Gibbons* [1972] 2 All ER 759 at 764-765, [1972] 1 WLR 693 at 700; *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA.

3 *Indata Equipment Supplies Ltd (t/a Autofleet) v ACL Ltd* [1998] 1 BCLC 412, [1998] FSR 248, CA, per Otton LJ, citing with approval *LAC Minerals Ltd v International Corona Resources Ltd* [1990] FSR 441 at 486, Can SC, per Sopinka J. See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL (the defendant's undertaking as to confidentiality, in the particular circumstances of being a member of one of the intelligence services, was 'closely akin' to a fiduciary obligation).

4 As to directors' obligations of confidence see para 458 post.

5 *Baker v Gibbons* [1972] 2 All ER 759 at 764-765, [1972] 1 WLR 693 at 700.

6 See *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 394. As to the characteristics of confidentiality see para 410 et seq ante.

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456. Other professional advisers.

A professional adviser (such as an accountant¹, an architect or engineer², a factor, a stockbroker or a surveyor³) is in a fiduciary relationship⁴ to his client⁵ and may therefore be under an obligation of confidence⁶.

1 See *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286, [1953] 2 All ER 691. As to accountants see further para 466 post.

2 See *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429. See also *Abernethy v Hutchinson* (1825) 3 LJOS Ch 209; *Floydd v Cheney, Cheney v Floydd* [1970] Ch 602, [1970] 1 All ER 446; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 (on appeal (but the appeal reported first) [1960] RPC 128, CA). See also, for cases involving engineers or engineering processes: *Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461; *Mechanical and General Invention Co Ltd and Lehwers v Austin and the Austin Motor Co Ltd* [1935] AC 346, HL; *BO Morris Ltd v F Gilman (BST) Ltd* (1943) 60 RPC 20; *Johnson v Heat and Air Systems Ltd* (1941) 58 RPC 229; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n, 65 RPC 203, CA; *KS Paul (Printing Machinery) Ltd v Southern Instruments (Communications) Ltd and EP Ellis (t/a Ellis & Sons)* [1964] RPC 118; *Bostitch Inc v McGarry & Cole Ltd* [1964] RPC 173; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Torrington Manufacturing Co v Smith & Sons (England) Ltd* [1966] RPC 285; *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL); *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923; *Franchi v Franchi* [1967] RPC 149; *Suhner & Co AG v Transradio Ltd* [1967] RPC 329; *Technography Printed Circuits Ltd v Chalwyn Ltd* [1967] RPC 339; *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605; *Regina Glass Fibre Ltd v Werner Schuller* [1972] RPC 229; *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675; *Standtex International Ltd v Blades and CB Blades Ltd* [1976] FSR 114; *Yates Circuit Foil Co Ltd v Electrofoils Ltd* [1976] FSR 345; *Potters-Ballotini v Weston-Baker* [1977] RPC 202, CA; *Harrison v Project and Design Co (Redcar) Ltd* [1978] FSR 81.

3 See *Brown v IRC* [1965] AC 244 at 265, [1964] 3 All ER 119 at 127, HL.

4 As to fiduciaries' obligations of confidence see para 455 ante. As to fiduciary relationships generally see EQUITY.

5 *Brown v IRC* [1965] AC 244 at 265, [1964] 3 All ER 119 at 127, HL.

6 See *Baker v Gibbons* [1972] 2 All ER 759 at 764-765, [1972] 1 WLR 693 at 700; *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417-418, DC; *W v Egdell* [1990] Ch 359 at 419, [1990] 1 All ER 835 at 848, CA; *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286, [1953] 2 All ER 691.

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457. Agents.

An agent owes a fiduciary duty to his principal¹ which includes the duty to use information obtained by virtue of the agency solely for the purposes of the agency² and not to divulge it to third parties³.

An agent may be under distinct and separate obligations when acting for two or more principals and therefore an estate agent is not under an implied obligation to reveal to one principal confidential information relating to a rival principal⁴.

1 See eg *Parker v McKenna* (1874) 10 Ch App 96 at 119; and AGENCY vol 1 (2008) PARA 73. An agent continues to owe a duty to the principal to provide pre-existing records of what has been done in his name, even after the agency relationship has ceased: *Yasuda Fire Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 at 185-186, [1995] 3 All ER 211 at 220. As to fiduciaries' obligations of confidence see para 455 ante. As to fiduciary relationships generally see EQUITY.

2 See AGENCY vol 1 (2008) PARA 76.

3 See AGENCY vol 1 (2008) PARA 76.

4 *Kelly v Cooper* [1993] AC 205, [1992] 3 WLR 936, PC.

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458. Directors.

Directors owe a fiduciary duty to the company¹ and have been described as agents of the company². A director may coincidentally, but not by virtue of his position, be a trustee³. The principle that where a person has obtained confidential information from another he must not use that information to the prejudice of the person who gave it applies with particular force as between a director and his company by reason of the fiduciary character of the duty owed by the one to the other⁴. However, the fact that an individual is a director does not extend his obligations of confidentiality to what would not otherwise be confidential⁵. A non-executive director may engage in a competing business (unless debarred by express terms in his contract of employment) but he must not use or put at risk confidential information of the company and must not solicit customers of the company on behalf of the competing business⁶.

1 *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n at 159n, [1942] 1 All ER 378 at 395, HL, per Lord Porter. As to directors and their duties see COMPANIES vol 14 (2009) PARA 532 et seq. As to fiduciary relationships generally see EQUITY. As to fiduciaries' obligations of confidence see para 455 ante.

2 See *Great Eastern Rly Co v Turner* (1872) 8 Ch App 149 at 152. As to agents see para 457 ante; and AGENCY.

3 See *Smith v Anderson* (1880) 15 ChD 247 at 275, CA, per James LJ, criticising the description of a director as trustee as a 'fallacy'.

4 *Baker v Gibbons* [1972] 2 All ER 759 at 764-765, [1972] 1 WLR 693 at 700. See also *Aubanel and Alabaster Ltd v Aubanel* (1949) 66 RPC 343; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193.

5 See *Yates Circuit Foil Co Ltd v Electrofoils Ltd* [1976] FSR 345 at 394.

6 *Aubanel and Alabaster Ltd v Aubanel* (1949) 66 RPC 343. As to employers' confidences see paras 431-432 ante.

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459. Partners and those involved in joint ventures.

Partners owe each other a duty of good faith¹, which has been held to include mutual obligations of confidence². They may, therefore, be held to be in breach of confidence³. If partners and parties to licensing agreements and joint ventures also owe each other a fiduciary duty⁴, it is likely that the same principles applicable to other fiduciaries and agents would apply, so that the relationship between them will not of itself render confidential what would otherwise not be so, but will lead to obligations of confidence being applied with particular force⁵.

In the absence of a formal partnership or any contractual or fiduciary or other special relationship binding collaborators in a secret process, a person who has been excluded from the project after contributing confidential information cannot restrain the subsequent use of that information by the other members of the team⁶.

1 See eg *Floyd v Cheney, Cheney v Floyd* [1970] Ch 602, [1970] 1 All ER 446. The principle is embodied in the Partnership Act 1890 ss 28, 29, 30: see PARTNERSHIP vol 79 (2008) PARAS 107-108, 135.

2 See note 1 supra.

3 *Glassington v Thwaites* (1823) 1 Sim & St 124 (partnership); *Floyd v Cheney, Cheney v Floyd* [1970] Ch 602, [1970] 1 All ER 446 (partnership); *Re Gallay Ltd's Application* [1959] RPC 141 (partnership); *Torrington Manufacturing Co v Smith & Sons (England) Ltd* [1966] RPC 285 (licensing agreement); *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL) (licensing agreement); *International Scientific Communications Inc v Pattison* [1979] FSR 429 (joint venture); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 (joint venture); *James Industries Ltd's Patent* [1987] RPC 235 (partners in joint commercial venture); *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, [1990] FSR 441, Can SC (mutual obligations of confidence existed in relation to information revealed by one party to the other for the purposes of possible joint business venture). See also *Worthington Pumping Engine v Moore* (1902) 20 RPC 41 at 46.

4 This issue is not conclusively decided, but is supported by some authority: see PARTNERSHIP vol 79 (2008) PARA 106. As to fiduciary relationships generally see EQUITY.

5 See *Baker v Gibbons* [1972] 2 All ER 759 at 764-765, [1972] 1 WLR 693 at 700.

6 *Murray v Yorkshire Fund Managers Ltd* [1998] 2 All ER 1015, [1998] 1 WLR 951, CA.

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460. Consultants.

Obligations of confidence may be incidental to consultancies¹.

1 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA; cf *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1977] 1 Lloyd's Rep 505, [1978] FSR 143, CA (confidence negated by wide circulation of report).

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461. Independent contractors and sub-contractors.

Whilst relationships with independent contractors and sub-contractors may not ordinarily be relationships of confidence, they may involve confidence¹. The application of basic rules of European Community competition law to these relationships may be modified by block exemptions².

1 *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 (on appeal (but the appeal reported first) [1960] RPC 128, CA).

2 See para 470 post; and COMPETITION vol 18 (2009) PARA 121.

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462. Patent agents and registered trade mark agents.

As professional advisers, patent agents¹ and registered trade mark agents² owe an obligation of confidentiality to their clients³. Statute makes special provision for professional privilege when such agents are consulted for particular purposes⁴.

1 As to patent agents generally see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 614 et seq.

2 As to registered trade mark agents generally see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) para 31 et seq.

3 See *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417-418, DC; *Brown v IRC* [1965] AC 244 at 265, [1964] 3 All ER 119 at 127, HL; and para 456 ante.

The test of business efficacy for implying an obligation of confidentiality in a contract would appear to apply particularly to the engagement of a patent agent since premature publicity for the subject matter of a patent would destroy its patentability. As to the business efficacy test see para 421 text and notes 11-14 ante.

4 See the Copyright, Designs and Patents Act 1988 s 280; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 618. See also the Trade Marks Act 1994 s 87; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) para 34.

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463. Bailees.

A bailee¹ who derives information from the possession of another's goods may deal with that information only in a manner expressly or impliedly stipulated by the terms of the bailment². The unauthorised disclosure or use of confidential information gained by reason of a bailment can accordingly attract redress equivalent to that which applies to bailments in general³.

An action to enforce the bailee's obligation of confidentiality may be founded purely on the bailment, although the obligation itself will often coincide with obligations derived from other sources, such as a contract⁴. Even where the bailment is founded on contract, the action for breach of bailment is distinct and independent both of contract and of tort⁵. Liability for breach of bailment may also follow irrespective of whether the bailment stems from a contract or other agreement between the parties⁶. A borrower or an unpaid depositary of goods may therefore be liable to the lender or depositor for an unauthorised disclosure or misuse of information derived from the bailment⁷. A sub-bailee may, by virtue of his status as a bailee of the head bailor, be answerable to the head bailor as well as to the intermediate bailee for unauthorised disclosure⁸. It is also possible that a finder of goods, by virtue of being treated generally as a bailee, owes a duty of confidentiality to the owner in certain cases⁹.

Where the bailment belongs to that class which imposes fiduciary responsibilities¹⁰ on the bailee, the bailment may support equitable obligations of confidentiality¹¹. However, not all bailments give rise to fiduciary obligations¹². In general, the fiduciary class is restricted to those bailments under which the bailor entrusts to the bailee goods to be held or dealt with by the bailee for the benefit of the bailor, or for limited purposes stipulated by the bailor¹³. Whereas the bailee to whom goods are entrusted for safekeeping, or for skill and labour, or for carriage, may well owe fiduciary obligations to the bailor, a bailee who undertakes no service for the bailor (such as a buyer of goods subject to a title retention clause, or a hirer) is, in general, unlikely to owe such obligations¹⁴.

Where the information derived from the bailment is in tangible form, such as a written document or computer disc, the court may order delivery up of that tangible record as a benefit derived by the bailee from the bailment¹⁵. Where information is recorded in tangible form, misuse of the tangible record may give rise to liability in tort, enabling the owner of the tangible record to sue, according to circumstances, in trespass to¹⁶, or conversion of, goods¹⁷. In special cases, the owner of the tangible record who sues in trespass or conversion may recover a reasonable charge for the use of the information contained in, and abstracted from, the

record¹⁸. In other cases, the owner of the tangible record may elect to recover the benefit which the converter or other wrongdoer derives from its misuse rather than compensatory damages¹⁹. It may be that, by analogy with the law regarding tangible chattels, information can be bailed, or can be treated as bailed for the purposes of determining the rights of entruster and recipient; if so, the confider can restrain the recipient from dealing with the information contrary to the terms of the entrustment, or can claim monetary remedies, in a manner akin to that which arises on a bailment²⁰.

1 As to bailment see para 408 ante; and BAILMENT.

2 *Reading v R* [1949] 2 KB 232 at 236, CA, per Asquith LJ (affd sub nom *Reading v A-G* [1951] AC 507 at 516, HL, per Lord Porter); *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 70, Aust HC, per Gibb CJ; *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315, NZ CA, per Cooke P, and at 318 per Gault J. See further *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 547-548 per Williams J; but cf at 534-536 per Latham CJ.

3 See generally BAILMENT vol 3(1) (2005 Reissue) paras 85-87; TORT vol 45(2) (Reissue) PARA 569 et seq.

4 As to contract see para 404 ante; and CONTRACT.

5 *Sutcliffe v Chief Constable of West Yorkshire* (1995) 159 JP 770 at 774, CA, per Otton LJ.

6 See BAILMENT vol 3(1) (2005 Reissue) para 1 et seq.

7 See BAILMENT vol 3(1) (2005 Reissue) paras 16, 30.

8 See BAILMENT vol 3(1) (2005 Reissue) para 41.

9 See BAILMENT vol 3(1) (2005 Reissue) para 11. Bailment arises whenever one person is voluntarily in possession of another's goods: *The Pioneer Container* [1994] 2 AC 324 at 342, [1994] 2 All ER 250 at 262, HL, per Lord Goff of Chieveley.

10 As to fiduciary relationships generally see EQUITY.

11 *Reading v R* [1949] 2 KB 232 at 236, CA, per Asquith LJ (affd sub nom *Reading v A-G* [1951] AC 507 at 516, HL, per Lord Porter) (upholding the discovery of a fiduciary relationship, giving rise to fiduciary obligations in the recipient, wherever one person entrusts to another property, including intangible property such as confidential information, on terms which delimit its use); *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 70, Aust HC, per Gibb CJ; *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 at 315, NZ CA, per Cooke P, and at 318 per Gault J. See also *Federal Comr of Taxation v United Aircraft Corp* (1943) 68 CLR 525 at 547-548 per Williams J; but cf at 534-536 per Latham CJ.

12 *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152 at 162-163 per Staughton J (presumption that bailee was a fiduciary); *Re Andrabell Ltd* [1984] 3 All ER 407 at 414 (no presumption that bailee was a fiduciary); *Re E Dibbens & Sons Ltd (in liquidation)* [1990] BCAC 577; and see *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 at 98, [1994] 2 All ER 806 at 821-822, PC.

13 *Re Hallett's Estate* (1880) 13 ChD 696 at 708-709, CA, per Jessel MR; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 101, Aust HC, per Mason J; and see Palmer on Bailment (2nd Edn, 1991) pp 189-192.

14 *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152 at 162-163 per Staughton J; *Re Andrabell Ltd* [1984] 3 All ER 407 at 414. In commercial bailments, express provision is often made for the bailee's observance of confidentiality: *Re Andrabell Ltd* supra.

15 *Sir Robert McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397 at 422 per Thesiger J, following *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254-255, [1952] 1 All ER 796 at 800-801, CA, per Denning LJ. See also para 408 ante.

16 *Thurston v Charles* (1905) 21 TLR 659 per Walton J. As to trespass to goods see para 405 ante; and TORT vol 45(2) (Reissue) PARA 659 et seq.

17 *Thurston v Charles* (1905) 21 TLR 659 (unauthorised disclosure of letter); *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337, BC SC (unauthorised exploitation of customer list). As to conversion of goods see para 405 ante; and TORT vol 45(2) (Reissue) PARA 548 et seq.

18 Semble, following *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796. See also *Sir Robert McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397 at 422 per Thesiger J; and para 408 ante.

19 *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254-255, [1952] 1 All ER 796 at 800-801, CA, per Denning LJ, followed in *Sir Robert McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397 at 422 per Thesiger J; and see TORT vol 45(2) (Reissue) PARAS 630, 640 (waiver of tort). See also *Borden Chemical Co (Canada) Ltd v JG Beukers Ltd* (1972) 29 DLR (3d) 337, BC SC (action in tort for conversion of customer list bailed by way of security resulted in bailor recovering as damages the value of the list to the bailee). See further para 408 ante.

20 See para 408 ante.

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464. Teachers and lecturers.

In respect of educational and pastoral duties, teachers and lecturers may be bound by the general obligations of the professions¹, coupled with special obligations in respect of personal information to which they may have access relating to pupils, students and their families². Pupils and students may come under an obligation not to make improper use of instructional information and materials communicated to them in the course of teaching³.

1 As to professional obligations generally see *Brown v IRC* [1965] AC 244 at 265, [1964] 3 All ER 119 at 127, HL; *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417-418, DC. Production of confidential records relating to the behavioural problems of a pupil may be required in the interests of justice: *M v British Railways Board* (1995) The Scotsman, 13 September.

2 As to the general obligation of confidence in relation to personal information see *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611; *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477; *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); *Thompson v Stanhope and Dodsley* (1774) Amb 737. Data protection legislation has an effect also on the obtaining and use of personal data, especially sensitive personal data, by education professionals: see para 510 post. See also the exemption from or modification of subject information provisions relating to education data (see para 548 post) and the provisions relating to data processed for the purposes of research, history and statistics (see para 551 post).

3 *Caird v Sime* (1887) 12 App Cas 326, HL; *Abernethy v Hutchinson* (1825) 3 LJOS Ch 209; *Nichols v Pitman* (1884) 26 ChD 374 (all cases concerned with the wrongful publication of lectures).

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465. Liquidators and receivers.

Liquidators and receivers are covered by the obligations of their professions (usually accountancy¹) and the general obligations of members of advisory professions². Confidential

information obtained by liquidators should not voluntarily be disclosed by them to defendants in collateral criminal proceedings in the absence of compelling reasons such as an order of the court³.

1 As to accountants' duty of confidence see para 466 post. See also *Evitt v Price* (1827) 1 Sim 483; cf *Parry-Jones v Law Society* [1969] 1 Ch 1 at 9, [1968] 1 All ER 177 at 180, CA.

2 As to professional obligations generally see *Brown v IRC* [1965] AC 244 at 265, [1964] 3 All ER 119 at 127, HL; *Hunter v Mann* [1974] QB 767 at 772, [1974] 2 All ER 414 at 417-418, DC. As to professional advisers' obligations of confidence see para 456 ante.

3 *Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208, [1991] 4 All ER 385; *Hamilton v Naviede* [1995] 2 AC 75, sub nom *Re Arrows Ltd (No 4)* [1994] 3 All ER 814, HL.

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466. Accountants.

In relation to confidential information that has been obtained through previous clients, accountants rendering litigation support owe duties similar to those owed by solicitors and the court may intervene to preserve the confidentiality of such material¹.

Where two accountancy firms merge, so that two parts of the new firm are acting in litigation against each other, effective information and physical barriers (known as 'Chinese walls') should be created between those involved in the litigation in order to safeguard against inadvertent leaks of confidential information².

The statutory duty to disclose information that a person knows or suspects to be related to money laundering or to terrorist offences has particular relevance to accountants³.

1 *Bolkiah v KPMG* [1999] 2 AC 222, [1999] 1 All ER 517, HL. As to the duty of solicitors when acting against a former client see para 453 text and note 6 ante.

2 *Young v Robson Rhodes (a firm)* [1999] 3 All ER 524. Cf *Bolkiah v KPMG* [1999] 2 AC 222 at 238-239, [1999] 1 All ER 517 at 529-530, HL, per Lord Millett (in order to eliminate all risk of leakage of confidential information within a firm, effective 'Chinese walls' should be built into the organisational structure and not established ad hoc).

3 See the Proceeds of Crime Act 2002 s 327 (money laundering); the Terrorism Act 2000 s 19 (terrorism); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 394; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 791.

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467. Arbitrators.

The Arbitration Act 1996 does not include express provision covering the issues of confidentiality in arbitrations and, as a result, these issues are governed primarily by the common law¹.

It is implicit in an arbitration agreement that the parties must not disclose or use for any other purpose any documents prepared for and used in the arbitration or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award; and they must not disclose in any other way what evidence had been given by any witness in the arbitration². However, such documents may be disclosed either with the consent of the other party³ or pursuant to a court order or with the permission of the court⁴. The award may be disclosed to a stranger to the arbitration if it is sufficiently necessary to do so in order to enforce or protect the legal rights of a party to the arbitration agreement⁵.

1 See the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) paras 10-17; and ARBITRATION vol 2 (2008) PARA 1269.

See, however, the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10(2), subjecting the right to freedom of expression to limitations (amongst other things) for preventing the disclosure of information received in confidence (see para 418 note 1 ante), which might protect the confidentiality of an agreement in settlements of a dispute.

2 *Dolling-Baker v Merrett* [1991] 2 All ER 890 at 899, [1990] 1 WLR 1205 at 1213, CA, per Parker LJ.

3 *Dolling-Baker v Merrett* [1991] 2 All ER 890 at 899, [1990] 1 WLR 1205 at 1213, CA, per Parker LJ.

4 *Dolling-Baker v Merrett* [1991] 2 All ER 890 at 899, [1990] 1 WLR 1205 at 1213, CA, per Parker LJ.

5 *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 at 249; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272 at 276. This qualification does not extend to the materials underlying the award such as statements of case and witness statements: *Hassneh Insurance Co of Israel v Mew* supra at 250.

UPDATE

467 Arbitrators

NOTES--As to the position with regard to confidentiality in mediation proceedings, see *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 (TCC), (2009) 125 ConLR 154.

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468. Insurance brokers.

When an insurance broker acts on behalf of both the policyholder and the underwriter, he is not obliged to disclose to the policyholder a report prepared whilst he was specifically acting on behalf of the underwriter¹. This is a qualification to the general rule that a person employed is under a duty not only to preserve confidential information from disclosure to third parties but also to disclose to his employer relevant information which becomes available to him in the course of his employment². The fact that an insurance broker is under a duty of utmost good

faith to reveal material facts when effecting a policy may operate as an implied release in respect of otherwise confidential information³.

Any information acquired by an insurance broker from his client must not be used or disclosed except in the normal course of negotiating, maintaining or renewing a contract of insurance, or in handling a claim for that client, unless the consent of the client has been obtained or the information is required by a court of competent jurisdiction⁴.

1 *North and South Trust Co v Berkeley* [1971] 1 All ER 980, [1971] 1 WLR 470. As to insurance generally see INSURANCE.

2 *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Saunders v Parry* [1967] 2 All ER 803, [1967] 1 WLR 753; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, [1972] 1 WLR 443; *Yasuda Fire Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174, [1995] 3 All ER 211. As to employers' confidences see also paras 431-432 ante.

3 *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602. The obligation (breach of which is neither a breach of contract nor a tort) is owed by the broker to the insurer personally and not as agent of the insured. It can be enforced only by avoidance of the policy: *Banque Keiser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, [1989] 2 All ER 952, CA (the appeal did not involve this issue but approval was given at [1991] 2 AC 249 at 280, [1990] 2 All ER 947 at 959, HL, per Lord Templeman).

4 Insurance Brokers Registration Council (Code of Conduct) Approval Order 1994, SI 1994/2569, reg 2, Schedule para 2(19). As to the insurance brokers' code of conduct see INSURANCE.

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(iv) Information held by Public Authorities

469. National and local government.

The courts recognise the need to balance the public interest requiring many governmental activities to be protected by full or partial confidence with the countervailing public interest in making available information about public affairs¹. The law of confidence provides the only ground in civil law for restraining publication of information relating to national security which is, of its nature, *prima facie* confidential², but, because of the need to consider the countervailing interest which favours disclosure, the party seeking to restrain publication must show not only that the material is confidential but also that it is in the public interest for it to remain undisclosed³. In view of the wide variety of matters covered, these countervailing interests will be balanced to different effect according to the circumstances⁴.

Whilst current Cabinet discussions are fully confidential, the passage of time may render them of merely historical interest so that publication will not be restrained if they have no security implications⁵. Members of the security services are under a lifelong obligation of confidence and both they and third parties, such as newspapers which receive information which they know or ought to know is confidential, may be restrained by injunction from disclosing the information unless the information has been so widely disseminated as to render an injunction futile⁶. A party intending to publish material already in the public domain will not be penalised by an injunction but may nevertheless be liable to an account of profits⁷. It is doubtful whether a party who, by improper disclosure, has made public information that was once confidential can continue to be restrained, but he may be liable for damages or to an account of profits⁸. In the

security service, the duty of confidence applies to all information except 'trivia of the most humdrum kind'⁹. The defence of iniquity¹⁰ will, at best, justify complaint through internal channels or very restricted publication¹¹.

Comprehensive and indefinitely prolonged confidentiality for security matters does not infringe the duty under the Human Rights Act 1998 (which gives effect in English law to provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms) to protect freedom of speech, as the Convention permits restrictions which are prescribed by law and necessary in a democratic society in the interests of national security and preventing the disclosure of information received in confidence¹².

Matters which have attracted governmental confidentiality include: (1) the functioning of aspects of government such as Cabinet collective responsibility (until lapse of time may have made protection no longer necessary)¹³; (2) the security services¹⁴; and (3) matters tending to prejudice foreign relations¹⁵. The fact that a third party knows that a party bound by an obligation of confidence intends to act in breach of that obligation and destroy confidentiality by publication will not of itself release the third party from his obligations¹⁶. If it is conceded in a particular case that publication of material in breach of confidence will not prejudice national security, a third party who obtains the material innocently will not be restrained from further publishing it merely in order to assert the lifelong obligation of confidence of the security officer who was its original author¹⁷.

A newspaper that publishes material which is known to have been disclosed in breach of confidence, and which other newspapers have been restrained from publishing by injunction, may be in criminal contempt of court¹⁸. The mens rea required to establish contempt is a specific intention to impede or prejudice the administration of justice and not mere recklessness as to whether that obstruction or prejudice would occur¹⁹.

A local authority, although under a statutory duty to provide an efficient and comprehensive library service²⁰, is in contempt of court if it makes available a book containing material published in breach of confidence when the further dissemination of that material by newspapers is the subject of an interim injunction, but the authority need not examine all newspapers, books and periodicals taken in its libraries to see if they contain material infringing the injunction²¹.

It is probable that a duty of confidence may, in principle, be owed by a government department²² and by a local authority²³.

1 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256, 265, 282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, 646-647, 659-660, HL; *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 485; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485, Aust HC. See also *Richmond upon Thames London Borough Council v Holmes* (2000) Times, 20 October (legitimate public interest in publishing report on local authority's trans-racial fostering policy).

2 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 291, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 666, HL, per Lord Goff of Chieveley. See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL (breaches of undertakings of confidentiality to the intelligence services are exceptional because the work depends upon confidentiality of information and the publication of confidential information already disclosed can constitute a further breach, deserving of remedy, even though the information is already in the public domain). As to the protection of official secrets in criminal law see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 478 et seq.

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256-258, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640-642, HL, per Lord Keith of Kinkel, and at 282 and 659 per Lord Goff of Chieveley; *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752 at 770-771, [1975] 3 All ER 484 at 495 per Lord Widgery CJ; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 492-493, Aust HC, per Mason J.

4 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752 at 767, [1975] 3 All ER 484 at 492 per Lord Widgery CJ. Secrets relating to national security may require to be preserved indefinitely: *A-G v*

Jonathan Cape Ltd, A-G v Times Newspapers Ltd supra at 770 and 495 per Lord Widgery CJ. The third limiting principle enunciated in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658, HL, per Lord Goff of Chieveley (that the public interest in maintaining confidences may be outweighed by some other countervailing public interest favouring disclosure) has been doubted in the light of the subsequent enactment of the Human Rights Act 1998 s 12, which gives effect to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS), and which gives an enhanced importance to freedom of expression and hence the right of the press to publish: see *Venables v News Group Newspapers Ltd* [2001] Fam 430 at [32]-[33], [2001] 1 All ER 908 at [32]-[33] per Butler-Sloss P.

5 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484.

6 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 260, 267, 288-289, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 643, 648, 664-665, HL.

7 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 260, 267, 288-289, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 643, 647-648, 663-664, HL. See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL.

8 It has been suggested that the person who breaches his obligation may also continue to be bound by 'some limited obligation analogous to the springboard doctrine' to prevent him exploiting his knowledge, but the point was not argued before the court and the question was expressly reserved: see *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 288, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 664, HL, per Lord Goff of Chieveley. As to the 'springboard' doctrine see para 424 ante.

9 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 284, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 660, HL, per Lord Goff of Chieveley; contra at 269 and 650 per Lord Griffiths.

10 As to the defence of iniquity see paras 416 ante, 485 post.

11 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 259, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 642, HL, per Lord Keith of Kinkel, and at 282-283 and 659-660 per Lord Goff of Chieveley.

12 See the Human Rights Act 1998; the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. See also the Freedom of Information Act 2000, which provides for a statutory right of access to information held by public authorities; and para 583 et seq post. See further *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477 (the lifelong duty of confidentiality which binds members of the intelligence and security services is in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms art 10, and is not absolute because disclosures can be made with lawful authority). 'Necessary' implies 'the existence of a pressing social need' and the interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued: see *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, HL, per Lord Keith of Kinkel, and at 288 and 660 per Lord Goff of Chieveley. See also *Lingens v Austria* (1986) 8 EHRR 407, ECtHR (discussed in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* supra at 156-159 and 580-582 per Scott J). An interim injunction might infringe the Convention for the Protection of Human Rights and Fundamental Freedoms art 10 if the material to which it relates has been so widely published as to undermine the case for restraint: *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL (injunction granted); *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, ECtHR; *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229, ECtHR (injunction held to infringe the Convention for the Protection of Human Rights and Fundamental Freedoms art 10).

13 *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484.

14 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 345; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL.

15 *Commonwealth of Australia v John Fairfax & Co Ltd* (1980) 32 ALR 485, Aust HC.

16 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 261, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 644, HL, per Lord Keith of Kinkel, and at 292 and 667 per Lord Goff of Chieveley.

17 *Lord Advocate v The Scotsman Publications Ltd* [1990] 1 AC 812, [1989] 2 All ER 852, HL.

18 However, the editor of a newspaper is not required to obtain prior confirmation from either the court or the Attorney General as to what information, the subject of an injunction, is in the public domain and can exercise his judgment, subject to complying with the law of confidentiality: *A-G v Times Newspapers Ltd* [2001] EWCA Civ 97, [2001] 1 WLR 885. As to contempt of court generally see CONTEMPT OF COURT.

19 *A-G v Newspaper Publishing plc* [1988] Ch 333, [1987] 3 All ER 276, CA. As to mens rea generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 8 et seq.

20 See the Public Libraries and Museums Act 1964 s 7 (as amended); and NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 929.

21 *A-G v Observer Ltd, Re an application by Derbyshire County Council* [1988] 1 All ER 385.

22 *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 at 181-182, [1973] 2 All ER 943 at 954, HL, per Lord Morris of Borth-y-Gest, and at 189-190 and 961 per Viscount Dilhorne; *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593. However, because injunctions may not generally be granted against the Crown or any officer of the Crown (see the Crown Proceedings Act 1947 s 21(1), (2); and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) para 134), the only preventative remedy will be a declaration: see para 494 post.

23 To the extent that a local authority is less concerned than a national government with issues of national security, the public interest in preserving confidentiality is likely to be reduced, while the defence of iniquity might be allowed greater scope: see generally *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752 at 767, [1975] 3 All ER 484 at 592 per Lord Widgery CJ; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 492-493, Aust HC, per Mason J. See also the text and notes 20-21 supra.

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NOTE 12--*Shayler*, cited, applied: *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin), [2009] 1 WLR 2653, [2009] All ER (D) 185 (Oct) (disclosure of redacted parts of judgment was in public interest) (affd: [2010] EWCA Civ 65, [2010] All ER (D) 118 (Feb)).

NOTE 22--*Norwich Pharmacal*, cited, considered in *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, (2007) 94 BMLR 84: see PARA 475.

NOTE 23--A local authority has a duty to keep private medical records confidential: see *Brent LBC v N (Foster Carers)* [2005] EWHC 1676 (Fam), [2006] 1 FLR 310 (foster carer with HIV infection; risk of transmission of disease to child negligible; carer's right to private life overrode interests of future adoptive parents). See *R (on the application of H) v A City Council* [2010] EWHC 466 (Admin), [2010] All ER (D) 127 (Mar) (disclosure to personal assistants by local authority of previous conviction of recipient of community care services beyond boundaries of permissible disclosure).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(iv) Information held by Public Authorities/470. European Community.

470. European Community.

As a matter of principle, the public has access to EC Council and Commission documents, and to all documents of the European Parliament¹, except where disclosure could undermine the protection of the public interest, privacy and the integrity of the individual, commercial interests, court proceedings and legal advice, and the purpose of inspections, investigations

and audits². The right of access extends not only to documents drawn up by the institutions, but also to documents received by them and in their possession³. However, where the documents of third parties are being considered for disclosure, the institution must consult the third party with a view to assessing whether one of the exceptions listed above is applicable, unless it is clear that the document must or must not be disclosed⁴.

Information which the European Commission acquires from its inquiries or investigations must be used only for the purposes of the relevant request or investigation and it must not disclose any information so acquired which is covered by an obligation of professional secrecy, but this is qualified in respect of the publication of decisions and observance of the right to be heard⁵. The Commission may be liable in damages if it releases documents in a form which enables an informant to be identified, although the damages may be reduced if the informant has not taken reasonable steps to protect his own interests⁶. National legislation may provide for exceptions to a directive imposing a duty of professional confidence, and when such exceptions are general in character the national court must balance the interest in establishing the truth against the interest in secrecy before deciding whether a witness should answer⁷. If a company against which complaints of anti-competitive practices have been made is not allowed to object to the production to the complainant of documents containing trade secrets, the decision of the Commission will be annulled without deciding whether or not there were trade secrets⁸. Provision is made for professional privilege; and in competition law there is provision for the regulation of confidentiality in relation to 'know-how', sub-contracting agreements, research and development agreements and the assignment of 'know-how'⁹. 'Block exemptions' may qualify the application of general rules in relation to some of these topics¹⁰.

1 See EC Council Regulation 1049/2001 (OJ L145, 31.5.2001, p 43) regarding public access to documents of the European Parliament, Council and Commission art 2. See also EC Council Regulation 45/2001 (OJ L8, 12.01.2001, p 1) which came into effect on 1 February 2001 and provides for the protection of personal data within European Union institutions and bodies in accordance with the Data Protection Directive. For the meaning of 'Data Protection Directive' see para 503 note 1 post. As to data protection generally see para 503 et seq post.

2 See EC Council Regulation 1049/2001 (OJ L145, 31.5.2001, p 43) art 4 paras 1, 2. Access to documents drawn up by an institution for internal use or received by an institution is denied if disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure: art 4 para 3. See also Case T-194/94 *Carvel v EU Council (Denmark intervening)* [1996] All ER (EC) 53 at 63-64 (the Council may refuse a request for access to documents in order to protect the confidentiality of its proceedings).

3 See EC Council Regulation 1049/2001 (OJ L145, 31.5.2001, p 43) art 2 para 3. See also Case T-309/97 *Bavarian Lager Co Ltd v EC Commission* [1999] ECR II-3217, [1999] 3 CMLR 544, CFI (access to Commission's draft reasoned opinion refused); Case T-92/98 *Interporc Im- und Export GmbH v EC Commission* [1999] ECR II-3521, [2000] 1 CMLR 181, CFI (Commission could only refuse access to documents it had drawn up solely for purpose of specific court proceedings); Joined Cases C-174/98P and C-189/98P *Netherlands and Van der Wal v EC Commission* [2000] ECR I-1, [2002] 1 CMLR 457, ECJ (Commission had to determine whether requested documents contained legal or economic analyses based on data supplied by national court, and, if so, whether disclosure would constitute infringement of national law); Case T-123/99 *JT's Corp Ltd v EC Commission* [2000] ECR II-3269, [2001] 1 CMLR 603, CFI (Commission's general policy of openness with regard to disclosure of information).

4 See EC Council Regulation 1049/2001 (OJ L145, 31.5.2001, p 43) art 4 para 4.

5 See EEC Council Regulation 17 of 6 February 1962 (OJ L13, 21.02.62, p 204) art 20.

6 Cases 145/83, 53/84 *Adams v EC Commission* [1986] QB 138, [1986] 1 CMLR 506, ECJ.

7 Case 110/84 *Municipality of Hillegom v Hillenius* [1985] ECR 3947, [1986] 3 CMLR 422, ECJ.

8 Case 53/85 *Akzo Chemie BV and Akzo Chemie UK Ltd v EC Commission, Engineering and Chemical Supplies, Epsom and Gloucester intervening* [1986] ECR 1965, [1987] 1 CMLR 231, ECJ.

9 A professional person exercising the right of establishment in another member state may be required to comply with that state's professional ethics: Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, [1996] All ER (EC) 189, ECJ.

10 As to block exemptions see COMPETITION vol 18 (2009) PARA 121.

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NOTES 1-4--See also Economic and Social Committee Decision 2003/603 (OJ L205, 14.8.2003, p 19) on public access to European Economic and Social Committee documents; EC Council Decision 2004/644 (OJ L296, 21.9.2004, p 16) on the protection of individuals with regard to the processing of personal data by the European Community institutions and bodies and on the free movement of such data; and EC Commission Decision 2008/597 (OJ L193, 22.7.2008, p 7) on rules concerning the Data Protection Officer on the protection of individuals with regard to the processing of personal data by Community institutions.

NOTE 2--The Commission and the Council are obliged to consider whether partial access should be granted to documents which might not be covered in their entirety by an exception: Case C-353/01P *Mattila v EU Council and EC Commission* [2004] 1 CMLR 1059, ECJ. Where a Community institution refuses to disclose documents because it would involve an unreasonably large amount of work to look through them, it must examine every option for disclosure and explain in detail why they are all unreasonable: Case T-2/03 *Verein für Konsumenteninformation v EC Commission* [2005] All ER (EC) 813, CFI. See also Case T-194/04 *Bavarian Lager Co Ltd v EC Commission* [2008] 1 CMLR 908, [2007] All ER (D) 126 (Nov), CFI. The Council cannot automatically refuse access to opinions of its legal service relating to a legislative process: Cases C-39/05 and C-52/05 *Sweden v EU Council* [2009] 2 WLR 867, [2008] All ER (D) 06 (Jul), ECJ. See also Case T-403/05 *MyTravel Group plc v EC Commission* [2008] 3 CMLR 1517, [2008] All ER (D) 54 (Sep), CFI (disclosure of document would undermine decision-making freedom of Commission).

NOTE 3--See Case C-64/05P *IFAW Internationaler Tierschutz-Fonds gGmbH v EC Commission* [2008] 3 WLR 756, ECJ (Community institution had discretion to grant access to documents where member state failed to provide reasons for refusal to allow access).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(iv) Information held by Public Authorities/471. Police.

471. Police.

Information which comes into the possession of the police is treated as confidential and must not be used for personal benefit nor divulged to other parties except in the proper course of police duty¹. The police may make limited, reasonable disclosures of confidential information but only to the extent that such disclosures are necessary, in purpose and degree, to carry out the public duties of the police². It is within the official duties of the police to give information, including information relating to offences which are spent under the Rehabilitation of Offenders Act 1974³, to Interpol (and, presumably, to like organisations such as Europol), and therefore it is not an offence on the part of the police to provide this information⁴. A police force may be justified in disclosing sensitive personal information to regulatory bodies, where the confidentiality of that information is maintained⁵, or to another police force⁶. There is a public

interest in allowing an accused to make statements to the police under caution without fear of further disclosure, although a prosecuting authority's obligation of confidentiality in this regard may not be absolute⁷. There may be cases where third parties interviewed by the police in connection with criminal proceedings may find the confidentiality of such interviews outweighed in exceptional circumstances by a greater public interest, but the extent and manner of any such disclosure must be limited stringently by the court⁸.

Police documents may be covered by public interest immunity and so be exempt from disclosure⁹. A claim to public interest immunity for evidence relating to an investigation of a complaint against the police¹⁰ was rejected and earlier authorities overruled, but a contents claim might apply to documents that came into existence in consequence of an investigation into a complaint of police misconduct¹¹. The determination of the claim is for the court not the litigant and it is to be resolved by weighing the public interests in disclosure and confidentiality in the actual litigation, without taking account of any collateral proceedings¹². If the police seize documents in the course of a criminal investigation they are bound to produce them on a witness summons in civil proceedings unless there is a ground of challenge such as legal professional privilege or self-incrimination¹³; and neither the fact that the documents are held for the public purpose of combating crime nor confidentiality between the police and the owner of the documents will bar their production¹⁴.

1 See the Police (Conduct) Regulations 1999, SI 1999/730, reg 4(1), Sch 1 para 7; and POLICE. Where a report, complaint or allegation indicates that a member of a police force has acted contrary to the code of conduct contained in Sch 1, he may be suspended from membership of the force and from his office of constable whether or not the matter has been investigated: see reg 5. As to information retrieved from the police national computer see *R v Brown (Gregory)* [1994] QB 547, [1994] 2 WLR 673, CA (affd [1996] AC 543, [1996] 1 All ER 545, HL) (alleged offence under the Data Protection Act 1984 s 5 (repealed)); *DPP v Bignell* [1998] 1 Cr App Rep 1, DC (considering the interplay between the Data Protection Act 1984 (repealed) and the Computer Misuse Act 1990); and para 582 post.

2 *R v Chief Constable of the North Wales Police, ex p AB* [1999] QB 396, [1998] 3 All ER 310, CA (the public identification of convicted paedophiles is an extremely sensitive matter, even where the information is in the public domain).

3 As to the rehabilitation of offenders see para 478 post; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

4 *X v Metropolitan Police Comr* [1985] 1 All ER 890, [1985] 1 WLR 420. See the Rehabilitation of Offenders Act 1974 s 9(2); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 538.

5 *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, CA (there is a public interest invested in the proper functioning of a regulatory body to whom the police could disclose confidential information where the confidentiality of that information is maintained).

6 *R(A) v Chief Constable of C* [2001] 1 WLR 461 (disclosure of allegations of inappropriate behaviour with children following criminal background check disclosed to another police force and local authority)

7 *Bunn v British Broadcasting Corp* [1998] 3 All ER 552; *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177, [1998] 4 All ER 801, HL; *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, CA (comments made during interview remained confidential even if not used in criminal proceedings). See also para 501 text and note 20 post.

8 *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May (confidentiality of statements made to police by prison officers suspected of assaulting prisoners outweighed by public interest in allowing prisoners to pursue personal injury claims on the basis of all relevant material).

9 *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL (report on probationary constable; disclosure ordered on the facts). As to disclosure generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq. As to public interest immunity see CIVIL PROCEDURE vol 11 (2009) PARAS 574-579.

10 The case cited in note 11 infra concerned investigations under the Police and Criminal Evidence Act 1984 Pt IX (ss 83-112) (ss 83-106 repealed; s 108 partially repealed; ss 109-112 repealed).

11 *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL.

12 *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL. See also *Savage v Chief Constable of the Hampshire Constabulary* [1997] 2 All ER 631, [1997] 1 WLR 1061, CA (police informer who wishes to sacrifice his anonymity is not precluded from doing so by the automatic application of the principle of public interest immunity at the behest of the relevant police authority); *Nicholls v British Broadcasting Corp* [1999] EMLR 791, CA (concealment of identity of 'supergrass' in television documentary as a contractual term).

13 As to legal professional privilege see CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

14 *Marcel v Metropolitan Police Comr* [1992] Ch 225, [1992] 1 All ER 72, CA.

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NOTE 1--See now Police (Conduct) Regulations 2008, SI 2008/645, reg 4 (see POLICE vol 36(1) (2007 Reissue) PARA 246).

NOTE 2--See *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079, [2010] 1 WLR 1136, [2009] All ER (D) 180 (Oct) (honest and rationally held belief that convictions, however old and minor, could be of value in the fight against crime meant that the retention of that information should not be denied to the police).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(iv) Information held by Public Authorities/472. Public corporations and utilities.

472. Public corporations and utilities.

Public corporations and utilities are to be treated on the same basis as private companies, and their confidences are therefore not assessed according to the competing public interests in confidentiality and disclosure which apply to governmental organisations¹.

1 See *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1202, [1981] 1 All ER 417 at 480, HL, per Lord Fraser of Tullybelton. The fact that an individual has a gas supply is not information which gives rise to a duty of confidence: *British Gas Trading v Data Protection Registrar* [1998] Info TLR 393, Data Protection Tribunal. As to trade secrets see COMPETITION vol 18 (2009) PARA 409 et seq. As to the matters which directors of a company must disclose see COMPANIES vol 14 (2009) PARAS 555-556, 560.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(iv) Information held by Public Authorities/473. Inspectors appointed under the Companies Act 1985.

473. Inspectors appointed under the Companies Act 1985.

Inspectors appointed under the Companies Act 1985¹ owe no duty to those who have provided them with confidential information that might prevent the use of such information for the purposes of their inquiry, but they have no statutory power to protect confidentiality by insisting upon interviewees signing undertakings regarding any information put to them, since it is sufficient protection simply to make the confidential character of the information known to the recipient².

1 See under the Companies Act 1985 s 431 or s 432. As to the appointment of inspectors under the Companies Act 1985, their powers and the conduct of the investigation, see COMPANIES vol 15 (2009) PARAS 1541-1544, 1554.

2 *Re an Inquiry into Mirror Group Newspapers plc* [2000] Ch 194, [1999] 2 All ER 641. As to the disclosure of confidential information in the public interest for the purpose of public inquiries see para 416 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(v) Journalistic, Artistic and Literary Confidences/474. Publishers and broadcasters.

(v) Journalistic, Artistic and Literary Confidences

474. Publishers and broadcasters.

If an idea for a book or theatre or television production is outlined to a publisher or broadcaster (for example, a theatre or television producer) in circumstances importing an obligation of confidence, the publisher or broadcaster comes under a corresponding obligation¹, and he will also be bound if he acquires work when he knows or ought to know that the person tendering it acquired it in breach of confidence². The obligation applies not only to the principal work but also to any advertising or publicity for that work³. Work intended for publication may not have the quality of confidentiality even if there is a commercial interest in suppressing it for a specific time⁴.

1 *Fraser v Thames Television Ltd* [1984] QB 44, [1983] 2 All ER 101; and see *Tuck & Sons v Priester* (1887) 19 QBD 48 (revised in part 19 QBD 629, CA); *Gilbert v Star Newspaper Co Ltd* (1894) 11 TLR 4; *Talbot v General Television Corp Ltd* [1981] RPC 1, Vict SC.

2 *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal (1849) 1 Mac & G 25.

3 *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal (1849) 1 Mac & G 25 (copies of catalogue to be destroyed).

4 *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443, CA. As to the exemption allowed under the Data Protection Act 1998 for data processed for journalistic, artistic or literary purposes see para 550 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(8) CLASSIFICATION OF CONFIDENCES/(v) Journalistic, Artistic and Literary Confidences/475. Journalists.

475. Journalists.

A journalist may incur obligations of confidence, similar to those binding members of other professions¹, in particular to his sources. At common law a journalist who refused to identify his sources when called upon to do so by the court might be held in contempt². However, it is now provided by statute that no court may require a person to disclose, nor is any person guilty of contempt for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the court that the disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime³.

The court retains a discretion to decline to order sources to be identified even in the excepted cases, but this is rarely exercised unless, for instance, a crime is very minor or disclosure would put the journalist at risk⁴. In cases other than those excepted, the court will not make orders which would indirectly identify a source, as by ordering the delivery up of a document from whose format the source could be traced⁵. The courts have taken different approaches to the interpretation of the exceptions, those for crime and national security being interpreted broadly to extend the exceptions, while the interests of justice have been treated more restrictively. In regard to the phrase 'necessary for the prevention of crime' it has been held that 'necessary', although stronger than 'useful or expedient', is less strong than 'indispensable'⁶, while 'prevention of crime' is not restricted to a specific future crime but means the deterrence and control of crime generally, so that crimes allegedly already committed might come within the exception⁷. 'Necessary in the interests of justice' means more than merely relevant⁸. Further, while prevention of crime and national security are good reasons for limiting the public interest in the confidentiality of sources, the interests of justice allow more detailed evaluation, including the importance of the case for the claimant, the public interest in the information from the source and the method by which the source obtained the material; and 'necessary' has been further interpreted to mean 'really needed'⁹. It is not sufficient for a party seeking disclosure of a protected source to show merely that he will otherwise be unable to exercise a legal right or avert a threatened legal wrong¹⁰.

There is also protection against police search and seizure of journalistic material¹¹ if it comes within the definition of excluded material¹² or special procedure material¹³.

When confidential material becomes available to a journalist the defence of public interest, iniquity or impropriety¹⁴ or a serious health hazard¹⁵ may, but will not always, justify full media publication¹⁶ but sometimes it may merely justify notifying those with corrective or regulatory powers¹⁷. With national security it is hard to envisage circumstances which would give rise to a public interest defence for external publicity since there are established internal means of complaint and investigation¹⁸. Public interest will not justify the commission of a crime to obtain evidence of iniquity or impropriety¹⁹. A party who, by widespread publicity, destroys the confidentiality of material may be restrained by injunction from using or disseminating it even though all others are free to use it, although this has been doubted²⁰. For personal information different terms of restraint may be imposed from those applicable to other types of information²¹ and although gross immorality will not be protected by confidence it is difficult to define²².

A newspaper which publishes confidential material without justification may be liable to an account of profits²³.

1 See *W v Egdell* [1990] Ch 359 at 419, [1990] 1 All ER 835 at 848, CA, per Bingham LJ.

2 *A-G v Mulholland, A-G v Foster* [1963] 2 QB 477, [1963] 1 All ER 767, CA; *British Steel Corp v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417. There was an exception in libel actions: see *Broadcasting Corp of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163, NZ CA; *British Steel Corp v Granada Television Ltd* *supra*. As to contempt of court generally see CONTEMPT OF COURT.

3 See the Contempt of Court Act 1981 s 10; and CONTEMPT OF COURT vol 9(1) (Reissue) para 408. Where confidential information had been mixed with false information for an evidently maleficent purpose, the production of the document containing the information may be required in the interests of justice, so that the

claimants might thereby identify the source and pursue an action for breach of confidence; and this interest, in the circumstances, outweighs the public interest in protecting the journalistic source: *Interbrew SA v Financial Times* [2002] EWCA Civ 274, [2002] EMLR 446.

4 *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 703, [1988] 1 All ER 203 at 208, HL. A one-off infringement of the confidentiality of legal professional privilege does not justify disclosure of the identity of the journalist's source: *John v Express Newspapers* [2000] 3 All ER 257, [2000] 1 WLR 1931, CA.

5 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 349-350, [1984] 3 All ER 601 at 606-607, HL (a civil servant remaining in post after disclosing a departmental memorandum was a threat to national security and therefore the handing over of the memorandum, from which that civil servant could be identified, was ordered).

6 *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704-705, [1988] 1 All ER 203 at 208-209, HL (the prosecution did not therefore have to show that it was only by the journalist's disclosure that a source could be identified).

7 *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704-705, [1988] 1 All ER 203 at 208-209, HL.

8 *Maxwell v Pressdram Ltd* [1987] 1 All ER 656, [1987] 1 WLR 298, CA (the fact that a claimant had added claims for exemplary and aggravated damages, which required identification of sources, to a claim in defamation did not bring the exception into operation).

9 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 53, [1990] 2 All ER 1 at 16, HL, per Lord Oliver of Aylmerton. The threshold of necessity may be reached even if the information is not required for the purposes of existing or intended proceedings: *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 4 All ER 193, [2002] 1 WLR 2033 (order requiring journalist to disclose source of confidential medical reports was necessary in a democratic society because the protection of patient confidentiality is of vital concern to the National Health Service, and the wrongdoer acted in breach of confidence and of contract). The decision in *Ashworth Hospital Authority v MGN Ltd* supra did not dispose of the case, and it was held in *Mersey Care National Health Service Trust v Ackroyd* [2003] EWCA Civ 663, 147 Sol Jo LB 595 that a journalist who has been ordered to deliver up a source should in most cases be entitled to the facts of his case being fully examined at trial.

10 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 43, [1990] 2 All ER 1 at 9, HL, per Lord Bridge of Harwich. See also *Mersey Care National Health Service Trust v Ackroyd* [2003] EWCA Civ 663, 147 Sol Jo LB 595 (an order for source disclosure could not be compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 unless it was justified by an overriding public interest). See further para 418 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 158.

Disclosure may be ordered in order to identify a source who had disclosed the business plan of a company (see *X Ltd v Morgan-Grampian (Publishers) Ltd* supra); or to enable an employer to identify a disloyal employee because a company's interest in preventing leaks of confidential information could override the protection of journalistic sources (see *Camelot Group plc v Centaur Communications Ltd* [1999] QB 124, [1998] 1 All ER 251, CA). See also *John Reid Enterprises v Peil* [1999] EMLR 675 (investigative journalist ordered to reveal his source in a company, which was small and required confidentiality to be maintained in order to do business; on the facts, however, it emerged subsequently that the journalist had retrieved the confidential material from the company's waste bins).

11 For the meaning of 'journalistic material' see the Police and Criminal Evidence Act 1984 s 13; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 875.

12 For the meaning of 'excluded material' see *ibid* s 11; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) paras 874-875.

13 For the meaning of 'special procedure material' see *ibid* s 14; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 876.

14 See *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA (conduct misleading public).

15 *Church of Scientology of California v Kaufman* [1973] RPC 627 (book justified).

16 *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA (defective breathalyser). See also *Bunn v British Broadcasting Corp* [1998] 3 All ER 552 (onus on journalist to justify overriding obligation of confidentiality arising from statement made under caution by accused).

17 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA (alleged racing irregularities should be revealed to police or Jockey Club); and see *Initial Services Ltd v Putterill* [1968] 1 QB 396, [1967] 3 All ER 145, CA.

18 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 269, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 650, HL, per Lord Griffiths, and at 282-283 and 659-660 per Lord Goff of Chieveley; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477.

19 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA (telephone tapping). Nor will it justify breach of medical confidentiality: *X v Y* [1988] 2 All ER 648.

20 *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (but see at 286-289 and 662-664 per Lord Goff of Chieveley, dissenting on this point (discloser should be liable and perhaps under a restraint akin to the 'springboard' doctrine, but perpetually enjoining the discloser will have absurd consequences)).

21 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 260, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 643, HL, per Lord Keith of Kinkel.

22 See *Stephens v Avery* [1988] Ch 449 at 453, [1988] 2 All ER 477 at 480 per Browne-Wilkinson V-C.

23 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. As to account of profits see para 497 post.

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NOTE 9--*Mersey Care*, cited, reported at [2003] EMLR 820. *Ashworth*, cited, considered in *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, (2007) 94 BMLR 84 (an intermediate source is not required to disclose an original source where there is no pressing social need for disclosure).

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(9) SPECIAL SITUATIONS OF CONFIDENCE

476. Children.

In adoption proceedings¹ the public interest and the child's best interests will prevail over the confidentiality of the mother's medical records². Proceedings under the Children Act 1989 are confidential³. However, information which has been voluntarily filed with the court may be disclosed to other parties⁴. Proceedings under the Children Act 1989 are not adversarial and it is for the court to achieve a result having regard to the welfare of the child in question⁵. To this end the court has power to override legal professional privilege⁶ and to order the disclosure of reports which would be privileged in other proceedings⁷.

The court has a discretion to disclose confidential material relating to adoption⁸, wardship⁹ and care proceedings¹⁰. Factors to be taken into account in assessing whether disclosure should be made include the interests of justice¹¹ and the welfare of the child¹². The Attorney General may be required to determine to what extent disclosure should be made¹³ and he is now to be represented by counsel in cases where, for example, disclosure may be relevant to criminal proceedings¹⁴.

1 As to adoption see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 323 et seq.

2 *Re C (A Minor) (Evidence: Confidential Information)* [1991] FCR 553, [1991] 2 FLR 478, CA. As to legal proceedings relating to children see generally CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 199 et seq; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) para 1704 et seq. As to access to medical records see para 446 ante. As to the control of patient information and the establishment of the Patient Information Advisory Group see paras 577-578 post.

3 An admission by a mother to a litigation friend that she was responsible for her children's injuries should not have been disclosed by the guardian to a social worker and should not have been further disclosed to the police, who should have obtained a court order before interviewing the litigation friend: *Oxfordshire County Council v P* [1995] Fam 161, [1995] 2 All ER 225. A litigation friend should not make a promise to children that whatever they tell her will not be disclosed to other parties, as it is a promise the litigation friend may not be able to keep if the court orders disclosure: *Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 1 WLR 356, CA; on appeal [1995] 4 All ER 385 at 393, 399, HL, per Lord Mustill (there is a presumption in favour of disclosure). A social worker, however, does not need the permission of the court in order to disclose to the police oral statements made by parents in relation to unexplained injuries sustained by their child: *Re G (Minor) (Social Worker: Disclosure)* [1996] 2 All ER 65, [1996] 1 WLR 1407, CA.

4 Where, in care proceedings, a mother voluntarily obtained a medical expert's report which she was ordered to file with the court and which then became available to all parties, the police authority could obtain disclosure of the report in order to consider whether to prosecute: *Re L (Police Investigation: Privilege)* [1995] 2 FCR 12, [1995] 1 FLR 999, CA. See also *Re W (Minors) (Social Worker: Disclosure)* [1998] 2 All ER 801, [1999] 1 WLR 205, CA (where documents relating to an investigation by social workers of a child's injuries have not been filed at court as part of proceedings, the court's permission is not required for disclosure of their contents to the police).

5 As to the welfare principle see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 300.

6 As to legal professional privilege see CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146; and para 453 ante.

7 *Oxfordshire County Council v M* [1994] Fam 151, [1994] 2 All ER 269, CA.

8 *Re G (T) (An Infant)* [1963] 2 QB 73, [1963] 1 All ER 20, CA; *Re JS (An Infant)* [1959] 3 All ER 856, [1959] 1 WLR 1218; *Re PA (An Infant)* [1971] 3 All ER 522, [1971] 1 WLR 1530, CA; *Re D (Adoption Reports: Confidentiality)* [1995] 1 WLR 356, CA.

9 *B v W (Wardship Appeal)* [1979] 3 All ER 83, [1979] 1 WLR 1041, HL; *Re H (A Minor)* [1985] 3 All ER 1, [1985] 1 WLR 1164, CA; *Re S (Minors) (Wardship: Police Investigation)* [1987] Fam 199, [1987] 3 All ER 1076; *Re F (Minors) (Wardship: Police Investigation)* [1989] Fam 18; *Re Manda* [1993] Fam 183, [1993] 1 All ER 733, CA. As to wardship see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 218 et seq.

10 *Re K (Minors) (Disclosure of Privileged Material)* [1994] 3 All ER 230. As to care orders see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 270 et seq. For factors in exercising discretion see *Cleveland County Council v F* [1995] 2 All ER 236, [1995] 1 WLR 785.

11 *Re S (Minors: Wardship: Police Investigation)* [1987] Fam 199, [1987] 3 All ER 1076 (prevention of crime prevailed over confidentiality); *Re K (Minors) (Disclosure of Privileged Material)* [1994] 3 All ER 230 (need for fair trial prevailed over confidentiality). Where an adult is in the guardianship of a local authority under the Mental Health Act 1983, and the mother (as nearest relative under the Act) is considering her power to discharge the guardianship, a balance has to be struck between the public and private interests involved, namely the proper administration of justice, the mother's right of access to legal advice, the protection of the health and welfare of the adult under guardianship, and the rights of the mother and her child to respect for family life and involvement in the decision-making process: *R(S) v Plymouth City Council* [2002] EWCA Civ 388, [2002] 1 WLR 2583 (where, in the circumstances, the balance was in favour of allowing the disclosure of confidential information to the mother and to her advisers).

12 *B v W (Wardship Appeal)* [1979] 3 All ER 83, [1979] 1 WLR 1041, HL (disclosure not harmful); *Re K (Minors) (Disclosure of Privileged Material)* [1994] 3 All ER 230 (disclosure no detriment to children); *Re Manda* [1993] Fam 183, [1993] 1 All ER 733, CA (disclosure might be for benefit of ward).

13 *Re an ex parte originating summons in an adoption application* [1990] 1 All ER 639n, sub nom *Re an Adoption Application* [1990] 1 WLR 520 (disclosure sought for the defence of a parent accused of an offence against a child in care).

14 *Practice Note* [1990] 1 All ER 640.

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NOTE 3--*Re D (Minors) (Adoption Reports: Confidentiality)*, cited, followed: *Re P (Non-disclosure of HIV Status)* [2006] 2 FLR 50.

NOTES 11, 12--See also *Re R (Children) (Secure Editing of Documents)* [2007] EWHC 876 (Fam), [2007] 1 WLR 1654.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(9) SPECIAL SITUATIONS OF CONFIDENCE/477. Credit reference agencies.

477. Credit reference agencies.

An individual has the right to find out whether a credit reference agency¹ has been consulted about him in any credit transaction in which he is involved, and to discover (and amend if necessary) the information any credit reference agency has compiled about him². No information obtained under or by virtue of the Consumer Credit Act 1974 about any individual or business may be disclosed without the consent of the individual or business concerned³.

1 As to credit reference agencies see CONSUMER CREDIT vol 9(1) (Reissue) paras 274, 284-287.

2 See the Consumer Credit Act 1974 ss 157-160 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) paras 284-287. An individual may request information from credit reference agencies under the Data Protection Act 1998 also, but such requests are taken to be limited to personal data relevant to the individual's financial standing, unless a contrary intention is shown: see s 9; and para 525 text and notes 12-18 post.

3 See the Consumer Credit Act 1974 s 174 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) para 313. However, these provisions do not apply in certain circumstances: see s 174; and CONSUMER CREDIT vol 9(1) (Reissue) para 313.

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NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or endorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(9) SPECIAL SITUATIONS OF CONFIDENCE/478. Rehabilitation of offenders.

478. Rehabilitation of offenders.

Legislation provides that many criminal offences, other than the most serious, are, after the lapse of prescribed periods of time, to be treated as spent and the person convicted is thereafter to be treated for all purposes in law as not having committed, been charged with, prosecuted for, or convicted and sentenced for the spent offences¹. There is a general prohibition on the admissibility in evidence of such offences but this is restricted by wide qualifications in respect of criminal and family law and where the interests of justice require disclosure². However, it is an offence to make unauthorised disclosure of spent convictions³.

1 See the Rehabilitation of Offenders Act 1974 s 4; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 660, 664, 665.

2 See *ibid* s 7 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660. 'Needs of justice' are to be assessed by the trial judge: *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyds Rep 22, CA. The interests of justice do not require the disclosure of spent convictions in an application for a protection order in respect of licensed premises: *R v Hastings Magistrates' Court, ex p McSpirit* (1994) 162 JP 44.

3 See the Rehabilitation of Offenders Act 1974 s 9 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) paras 533, 538. See also *X v Metropolitan Police Comr* [1985] 1 All ER 890, [1985] 1 WLR 420; and para 471 ante.

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479. Compromises and settlements.

If a client authorises a solicitor to negotiate a settlement prior to the issue of a claim form, this instruction will not be covered by legal professional privilege¹ because the solicitor is authorised to communicate the client's offer to the other side and any rule to the contrary would undermine settlements negotiated at this stage before a solicitor has implied authority to settle the case². When an action is compromised, an implied obligation not to use the documents produced in the course of that action for further proceedings abroad applies to witness statements but not to expert reports³.

1 As to legal professional privilege see CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

2 *Conlon v Conlons Ltd* [1952] 2 All ER 462, [1952] WN 403, CA.

3 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, [1991] 1 WLR 756. As to the possible exemption of settlements from the general right to freedom of expression guaranteed by the Human Rights Act 1998 see para 467 note 1 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(10) BREACH OF OBLIGATIONS OF CONFIDENCE/480. Breach of confidence.

(10) BREACH OF OBLIGATIONS OF CONFIDENCE

480. Breach of confidence.

Breach of confidence may be constituted by the unjustified disclosure or use¹, or by the unjustified putting at risk of such disclosure or use², of the information imparted or, in the case of third parties, by the improper obtaining of confidential material³ or, if the material was initially obtained innocently, by the improper retention or use of the confidential material when the recipient knew or ought to have known that it was confidential⁴. The disclosure or use may be partial provided that it is significant and substantial⁵.

Breach of confidence may result not only from the disclosure of the primary material but also from ancillary or subsidiary public references to it, as when a catalogue containing details of protected etchings was held to be a breach of the confidence protecting the etchings⁶. Overhearing information by accident⁷ or obtaining information as a bona fide purchaser for value without notice may not involve liability⁸. There is no irrebuttable presumption that an employee who has stolen confidential material from the employer and used it to contact customers has thereby obtained business from customers; it is a question of fact whether business has resulted from the misuse or from the employee's own skills⁹.

1 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128, CA; *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL); *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA. A statutory duty of confidence will not be broken by a reasonable disclosure envisaged by the statute: *Hoechst UK Ltd v Chemiculture Ltd* [1993] FSR 270. As to the use of 'derivative products' see *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289. A third party is prohibited from disclosing confidential information that is the subject of an interim consent order with notice by virtue of the law of contempt of court, but that prohibition ends when the proceedings end: *Jockey Club v Buffham* [2002] EWHC 1866, [2003] QB 462. As to contempt of court see CONTEMPT OF COURT.

2 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350, CA.

3 See *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498 at 503-504. The use of surveillance techniques is an example of where an intrusion into a person's privacy may give rise to liability in an action for breach of confidence unless the intrusion can be justified: *Venables v News Group Newspapers Ltd* [2001] Fam 430 at [81], [2001] 1 All ER 908 at [81], cited in *A v B plc* [2002] EWCA 337 at [11] (x), [2003] QB 195 at [11](x), [2002] 2 All ER 545 at [11](x) per Lord Woolf (obiter). See also paras 579-581 post.

4 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); *Richards v Dobell* (1912) [1911-1916] MacG Cop Cas 51; *Rex Company and Rex Research Corp v CH Muirhead and HM Comptroller of Patents* (1927) 44 RPC 38; *London and Provincial Sporting News Agency Ltd v Levy* (1928) [1923-1928] MacG Cop Cas 340; *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* (1951) 68 RPC 190 (revised on other grounds [1952] 1 TLR 101, 69 RPC 10, CA); *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] RPC 239 at 253; *Fraser v Evans* [1969] 1 QB 349 at 361, [1969] 1 All ER 8 at 11, CA; *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593; *Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 All ER 620; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658-659, HL; *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL.

However, the purchaser of a product, provided that he does not infringe intellectual property rights vested in others or contractual terms binding on him, is not precluded from dismantling a machine to find out how it works and telling anyone he pleases: *Alfa Laval Cheese Systems Ltd v Wincanton Engineering Ltd* [1990] FSR 583 at 592. Accordingly, although unpublished and unencrypted information remains confidential in that form, the decryption of that same information in a product available on the market is not a breach of confidence since the owner has full right of ownership, which includes the entitlement to dismantle: *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138.

As to the offences under the data protection legislation see paras 566-567 post. As to the possible bailment of information see paras 408, 463 ante.

5 *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239 at 246-248.

6 *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal (1849) 1 Mac & G 25.

7 *Malone v Metropolitan Police Comr* [1979] Ch 344, [1979] 2 All ER 620.

8 *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316 at 328, [1987] 1 WLR 1248 at 1265 per Browne-Wilkinson V-C; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 177, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 596, CA; *Morison v Moat* (1851) 9 Hare 241 at 263. For authorities which suggest the contrary see para 422 note 8 ante.

9 *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257, [1992] 1 WLR 840. See also *Cantor Fitzgerald International v Tradition (UK) Ltd* [2000] RPC 95, (1999) Times, 19 May (the use in new employment of an ex-employer's computer source code, even as a mere reminder or reference point, constituted a breach of confidence). The test for fixing a new employer with assisting an employee in breach of confidence in relation to his previous employer is that given in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC (see TRUSTS vol 48 (2007 Reissue) para 704); *Thomas v Pearce* [2000] FSR 718, CA.

UPDATE

480 Breach of confidence

NOTE 4--For a duty of confidentiality to be owed, other than under a contract or statute, the information in question must be of a nature and obtained in circumstances such that any reasonable person receiving it would recognise that it should be treated as confidential: *Napier v Pressdram Ltd* [2009] EWCA Civ 443, [2010] 1 WLR 934, [2009] All ER (D) 31(Jun); *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB), [2010] IP & T 194.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(10) BREACH OF OBLIGATIONS OF CONFIDENCE/481. Intention or negligence.

481. Intention or negligence.

In relation to claims for damages for breach of confidence it is, in general, immaterial why the defendant failed to fulfil his obligation, and it is no defence to plead that he has done his best¹. If liability is to be based on conspiracy², or conversion³ of, or trespass⁴ to, material embodying the confidence, the state of mind and degree of unjustified interference required by those torts must be shown⁵.

To establish the tort of inducing breach of contract it must be shown that the defendant knowingly and intentionally induced the breach⁶ and a similar rule may apply to the knowing and intentional inducing of the breach of an equitable obligation⁷. If the obligation is equitable, intention or negligence will found liability both in immediate parties to the confidence and in third party recipients, since it has been held that even subconscious plagiarism is sufficient for liability⁸. An innocent third party who voluntarily receives material may also be liable after he has discovered the confidential character of the material, but it may be that a bona fide purchaser for value without notice will not be liable⁹. Intent or negligence may be taken into account when discretion is exercised to grant an injunction¹⁰. Many of the sources of liability mentioned may co-exist and be actionable in the same case¹¹.

1 See *Raineri v Miles* [1981] AC 1050 at 1086, [1980] 2 All ER 145 at 158, HL, per Lord Edmund-Davis. Contracts for professional services, such as those provided by accountants, architects, doctors and solicitors,

merely impose duties of care in respect of primary professional duties since success cannot be guaranteed, but this qualification may not extend to subsidiary obligations to preserve confidences. As to the general professional obligation of confidence see para 439 et seq ante.

- 2 As to conspiracy see para 405 ante; and TORT vol 97 (2010) PARA 623 et seq.
- 3 As to conversion see paras 405, 407 ante; and TORT vol 45(2) (Reissue) PARA 548 et seq.
- 4 As to trespass to goods see para 407 ante; and TORT vol 45(2) (Reissue) PARA 659 et seq.
- 5 See the text and notes infra; and TORT vol 45(2) (Reissue) PARAS 548 et seq, 659 et seq; TORT vol 97 (2010) PARA 623 et seq.
- 6 As to inducing breach of contract see para 405 ante; and TORT vol 97 (2010) PARA 614 et seq.
- 7 See *Prudential Assurance Co Ltd v Lorenz* (1971) 11 KIR 78 (breach of equitable duty); *Bents Brewery Co Ltd v Hogan* [1945] 2 All ER 570; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193.
- 8 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA; and see *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* (1959) [1967] RPC 375 (on appeal (but the appeal reported first) [1960] RPC 128, CA).
- 9 It has been held that no action will lie against an innocent person who uses information originally obtained in breach of confidence without knowing of the improper origin: *Cooksley v Johnson & Sons* (1905) 25 NZLR 834, NZCA. See further para 422 text and notes 7-8 ante. Compare with the test for restitution on the grounds of knowing receipt: see RESTITUTION vol 40(1) (2007 Reissue) para 146 et seq. Liability is based on receipt rather than fault, and the cause of action is available only where a defendant has received or applied money in breach of trust for his own use or benefit. It has been suggested that there is no requirement of either actual knowledge of the breach of trust or dishonesty; constructive notice is sufficient: *Twinsectra Ltd v Yardley* [2002] UKHL 12 at [105], [2002] 2 AC 164 at [105], [2002] 2 All ER 377 at [105] per Lord Millett (dissenting but not on this point).
- 10 See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 50 per Megarry J. As to injunctions see paras 492-493 post.
- 11 As to the interrelation of the heads of jurisdiction see para 403 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(10) BREACH OF OBLIGATIONS OF CONFIDENCE/482. Detriment.

482. Detriment.

It has been suggested that detriment is a necessary element of actionable breach of confidence¹. However, this has been doubted on good authority, at least in relation to personal confidences where, if detriment must be shown at all, it may be merely to the extent that the information given by the confider has been disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way². In the case of governmental secrets and confidences it has been said that the element of public interest in preserving confidence which the Crown must show to enforce its rights carries with it a requirement to show that publication would be harmful to the public interest³ and this was accepted even when reservation was expressed on whether detriment was an essential requirement for actionable breach in private law⁴. Intention or negligence⁵ may be taken into account when exercising discretion in granting an injunction⁶.

1 See eg *Lamb v Evans* [1893] 1 Ch 218 at 236, CA; *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239 at 245; *Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461 at 480; *Seager v Copydex Ltd* [1967] 2 All ER 415 at 417, [1967] 1 WLR 923 at 931, CA, per Lord Denning MR (information obtained in confidence not to be used 'to the prejudice of him who gave it without obtaining his consent').

2 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640, HL, per Lord Keith of Kinkel. See also *Prince Albert v Strange* (1849) 2 De G & Sm 652 at 697 ('produce of private hours' to be protected); *Pollard v Photographic Co* (1888) 40 ChD 345 (unwanted publicity for portrait restrained).

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 256-258, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 640-642, HL, per Lord Keith of Kinkel, citing *A-G v Jonathan Cape Ltd, A-G v Times Newspapers Ltd* [1976] QB 752, [1975] 3 All ER 484 (where the decision depended on the fact that the publication would do no harm) and *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 492-493, Aust HC, per Mason J. See also *A-G v Observer Ltd, A-G v Times Newspapers Ltd* supra at 270-271 and 650-651 per Lord Griffiths, accepting the same authorities.

4 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281-282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659, HL, per Lord Goff of Chieveley, citing *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 per Megarry J. See also *A-G v Observer, A-G v Times Newspapers Ltd* supra at 265 and 646 per Lord Brightman (expressing agreement with the majority); at 293 and 668 per Lord Jauncey of Tullichettle (agreeing with Lord Keith of Kinkel); and at 270 and 650 per Lord Griffiths (regarding detriment or potential detriment as essential in private litigation since the remedy is to protect the confider not punish the confidant). The point was left open in *R v Department of Health, ex p Source Informatics Ltd* [2001] QB 424, [2000] 1 All ER 786, CA. However, see *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804 (where what is in issue is peculiarly private and personal information, it is not necessary to establish any specific harm or detriment arising out of the misuse of the information).

5 As to intention and negligence see para 481 ante.

6 See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 50 per Megarry J. As to injunctions as a remedy see paras 492-493 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(11) PARTIES TO AN ACTION/483. Claimant.

(11) PARTIES TO AN ACTION

483. Claimant.

Only the person to whom the duty of confidence is owed may bring an action for breach of confidence and this person may not necessarily be the creator of the information¹. Although privity of contract may apply to the creation of a confidence, the fact that contractual and equitable obligations may co-exist in the same case and the same criteria be used for their implication², together with the fact that the equitable obligation is not subject to the contractual requirement of privity, may enable a claimant to sue a party who is not privy to the contractual obligation³.

The claimant must establish that: (1) the information had the quality of confidentiality; (2) it was imparted in confidence; and (3) unauthorised use, possibly to the claimant's detriment, was made of it⁴. If the original creator was acting as an agent or in some other fiduciary or subsidiary capacity, such as a servant or independent contractor, then the person entitled to the confidence and thereby able to sue will be the principal, the beneficiary or the employer⁵. In so far as confidential information possesses the character of property then those to whom the information has been transferred by way of sale, licence or operation of law⁶, together with personal representatives and successors in title of a deceased person entitled to protection may, it seems, sue⁷.

If the claimant fails to disclose the full and proper particulars of confidential information relied on or makes false claims as to the confidential nature of information, this may be regarded as prejudicing the defendant and held to amount to an abuse of process⁸.

Confidential information that has been disclosed for the purposes of litigation does not necessarily lose its confidential character, but the continuation of confidence may depend upon circumstances attending the proceedings and upon orders of the court⁹.

1 *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA (where a consultant was engaged to prepare a confidential report and wished to sue a third party who had obtained it and proposed to publish a copy, only the person who engaged him, and not the consultant, could sue).

2 *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) [1963] 3 All ER 413n, 65 RPC 203, CA; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429 at 431; *Lamb v Evans* [1893] 1 Ch 218, 229, CA; *Robb v Green* [1895] 2 QB 315, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97. See also para 404 text and note 7 ante.

3 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. As to the doctrine of privity generally, and the exceptions to it allowed by common law, equity and statute (eg the Contracts (Rights of Third Parties) Act 1999), see CONTRACT vol 9(1) (Reissue) para 748 et seq.

4 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (where only head (2) in the text was established); *Johnson v Heat and Air Systems Ltd* (1941) 58 RPC 229 (where head (2) in the text was established but there was no misuse since the defendants already possessed the information). As to detriment see para 482 ante.

5 *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA.

6 If the opinion of Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 at 128, [1966] 3 All ER 721 at 759, HL, that information is not 'property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship' were to prevail, then a transferee or assignee would merely have a right to compel the transferor to sue an infringer but a majority in that case favoured the view that information is property, as do the majority of dicta in other cases (see para 407 note 7 ante). A trade secret has been held to be trust property (*Green v Folgham* (1823) 1 Sim & St 398), and sold with a business (*Bryson v Whitehead* (1822) 1 Sim & St 74).

7 A trade secret has: (1) passed to a trustee in bankruptcy (*Re Keene* [1922] 2 Ch 475); (2) been left by will (*Canham v Jones* (1813) 2 Ves & B 218); and (3) been treated as partnership property (*Dean v McDowell* (1878) 8 ChD 345). The professional codes issued by the General Medical Council and the Law Society contemplate obligations of confidence of doctors (see para 439 ante) and solicitors (see para 453 ante) surviving their patients or clients.

8 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289.

9 See para 502 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(11) PARTIES TO AN ACTION/484. Defendant.

484. Defendant.

The initial recipient of protected confidential information will be liable in the event of his making unauthorised disclosure or use of the material or putting the material at risk of unauthorised disclosure or use¹. Third parties who acquire by underhand, dishonest or improper means information which they know or ought to know is subject to protected confidence may also be sued, as may third parties who initially acquire such information innocently but subsequently learn of its confidential character². Such third parties incur liability from the time of knowledge or notice³. It may be that a bona fide purchaser for value without notice does not incur liability⁴. A party acting in breach of confidence will not be allowed to use a company to evade liability, as knowledge or notice will be imputed to the company⁵.

Under the 'springboard' doctrine a party who has had authorised access to confidential material not fully available to the public will be restrained from taking advantage of his position until the relevant information has been made fully public⁶. An employer or principal may be entrusted with confidential information which is to be further disclosed to employees or agents; and, in the event of breach, the liability of the employer or principal will primarily depend on the express or implied terms of the contract or equitable obligation under which the material was first imparted⁷. If the subordinate or agent improperly discloses or misuses the information knowing of its confidential character, the employer or principal may be directly liable to the creator of the confidence, as may the employee⁸. Otherwise, such employees or agents may be treated as third parties, thereby becoming immediately liable if they disclose or misuse the material knowing it to be confidential but otherwise incurring liability only when they receive notice or knowledge of its character⁹.

1 See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41; *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1978] FSR 143, CA; *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260, CA; and paras 402, 480 ante.

2 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL.

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658-659, HL, per Lord Goff of Chieveley. See further para 422 text and note 7 ante.

4 See para 422 text and note 8 ante.

5 See para 422 text and note 6 ante.

6 As to the 'springboard' doctrine see para 424 ante.

7 See para 431 ante. As to statutory protection for disclosures by employees see para 432 ante.

8 Obligations of this type, both for the employer or principal and for the employee or agent, may continue after the employment has ceased if that is necessary to give business efficacy to the obligation of confidence: see *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 27, [1981] 2 All ER 321 at 338, CA. Cf *Easton v Hitchcock* [1912] 1 KB 535, DC. See also *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117, [1986] 1 All ER 617, CA.

9 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658-659, HL, per Lord Goff of Chieveley. See further para 422 text and note 7 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(12) DEFENCES/485. Just cause or excuse and public interest.

(12) DEFENCES

485. Just cause or excuse and public interest.

It has long been established that there is no confidence as to the disclosure of iniquity, and therefore obligations of confidence will not require the concealment of wrongdoing¹. This defence to disclosure has been progressively expanded and older references to iniquity must be taken to be illustrative rather than definitive of the degree of wrongdoing which will suffice for the operation of this defence². It has been said to extend to crimes, frauds and misdeeds, both those actually committed as well as those contemplated, provided always that disclosure is justified in the public interest³.

The defence covers both past and contemplated crimes⁴. In relation to civil wrongs, there seems to be no doubt that contemplated wrongdoing can be revealed and older authority suggesting that past torts should not be revealed⁵ has been disapproved, provided that the disclosure of the tort is in the public interest⁶. Current or future medical hazards will also be covered⁷, but not those which have ceased to be operative⁸. If a doctor believes that his mental patient, who is seeking release, is likely to be more dangerous than other doctors believe, he will be justified in revealing this to the appropriate authorities⁹. Disclosure of unreliability in equipment used to provide evidence for use at criminal trials has also been held to be justified, and it has been said that what is disclosed in the public interest need not be wrongdoing to be covered by the defence¹⁰. Conduct and misrepresentations which mislead the public¹¹ may also be disclosed, as may gross immorality, but in the absence of a generally accepted moral code it is difficult to define the scope of the latter¹².

Whether the intended disclosure is in the public interest must be judged at the time when disclosure is sought¹³; any such disclosure must be both proportionate in extent and made to the proper authorities¹⁴. It is difficult to envisage circumstances when a defence of iniquity or public interest would justify media disclosure of the work of the security and intelligence services, since there are established internal channels for representations, and any refusal of permission to disclose to the proper authorities in accordance with the Official Secrets Acts 1911 to 1989 can be reviewed by the courts¹⁵. It is not permissible to commit a criminal offence in order to obtain confidential material which the acquirer proposes to reveal in the public interest¹⁶.

Negligence and incompetence may not be enough to bring the defence into operation¹⁷. Four factors are to be considered in applying the defence: (1) the difference between that in which the public is interested and that which it is in the public interest to disclose; (2) the special interest of the media in publicity; (3) the fact that limited publicity may be appropriate in a given case; and (4) the fact that what is to be regarded as iniquity changes over the years¹⁸. A statutory duty of confidence will not be broken by a reasonable disclosure of a type envisaged by the statute, such as to the Health and Safety Executive in regard to the packaging of chemicals¹⁹.

1 *Gartside v Outram* (1856) 26 LJCh 113 at 114. See also *Annesley v Earl of Anglesea* (1743) 17 State Tr 1139 at 1223-1246, cited in *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA.

2 See *Fraser v Evans* [1969] 1 QB 349 at 362, [1969] 1 All ER 8 at 11, CA; *Lion Laboratories Ltd v Evans* [1985] QB 526 at 537-538, 548, [1984] 2 All ER 417 at 423, 431, CA, and at 538, 550 and 423-424, 432-433, suggesting that the defence does not require any wrongdoing. In *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 411, [1984] 1 WLR 892 at 895-896, CA, Donaldson MR suggested the justifying conduct could be termed 'anti-social'.

3 *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA, per Lord Denning MR (approved in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1169, 1201, [1981] 1 All ER 417 at 455, 480, HL); *Lion Laboratories Ltd v Evans* [1985] QB 526 at 537-538, [1984] 2 All ER 417 at 423, CA. As to the test to be applied when balancing the public interest against the right of an individual to a private life see: *R v a local authority in the Midlands, ex p LM* [2000] 1 FCR 736.

4 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 481, 486, CA (banker); *Kitson v Playfair* (1896) Times, 28 March (doctor); *Weld-Blundell v Stephens* [1919] 1 KB 520 at 527, 533, CA; *Malone v Metropolitan Police Comr* [1979] Ch 344 at 377, [1979] 2 All ER 620 at 646; *Khashoggi v Smith* (1980) 124 Sol Jo 149, CA.

5 See *Weld-Blundell v Stephens* [1919] 1 KB 520 at 527, CA; on appeal [1920] AC 956, HL.

6 *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405, [1967] 3 All ER 145 at 148, CA; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260-261; *Malone v Metropolitan Police Comr* [1979] Ch 344 at 361-362, [1979] 2 All ER 620 at 634-635.

7 *Hubbard v Vosper* [1972] 2 QB 84, [1972] 1 All ER 1023, CA; *Church of Scientology of California v Kaufman* [1973] RPC 627 (affd (1972) 117 So Jo 72, CA) (interlocutory proceedings); *Church of Scientology of*

California v Kaufman [1973] RPC 635 (trial of action). See also *Re Smith Kline & French Laboratories Ltd* [1990] 1 AC 64, HL (confidential information disclosed to a licensing authority which has been established by statute to protect the public health may be used by the authority for any of the purposes for which it has been established).

8 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 27, [1981] 2 All ER 321 at 337-338, CA.

9 *W v Egdell* [1990] Ch 359, [1990] 1 All ER 835, CA. See also *Tarasoff v Regents of the University of California* (1976) 17 Cal (3d) 425.

10 *Lion Laboratories Ltd v Evans* [1985] QB 526 at 538, 550, [1984] 2 All ER 417 at 423, 432-433, CA.

11 *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA. It is not necessarily in the public interest to demonstrate that a public figure has feet of clay, even where the figure has become a role model, if she has not necessarily sought that out, but a public interest may be found where particular confidential information gives credence to a story which demonstrates that the claimant has been deceiving the public: *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.

12 *Stephens v Avery* [1988] Ch 449 at 453-454, [1988] 2 All ER 477 at 480-481 (specific agreement to conceal relationship); but see per Garland J in *M and N v MacKenzie and News Group Newspapers* (18 January 1988, unreported), holding that a homosexual relationship does not per se create an obligation of confidence (cited, without expressing an opinion on the case, in *Stephens v Avery* supra at 456 and at 482-483).

13 *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1977] 1 Lloyd's Rep 505 at 509, CA; *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May.

14 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 268-269, 282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL; *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604 at 615, [2000] 1 WLR 25 at 36, CA; *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May (the public interest may include the administration of justice and where a court determines that the public interest in disclosure for this purpose outweighs the public interest in maintaining confidentiality, stringent conditions may be imposed upon the manner and extent of disclosure).

15 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 269, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 650, HL, per Lord Griffiths, and at 282-283 and 659-660 per Lord Goff of Chieveley; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477. As to the Official Secrets Acts 1911 to 1989 see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 478 et seq.

16 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 412, 415, [1984] 1 WLR 892 at 897, 901, CA (illegal private phone tapping). See also the Public Interest Disclosure Act 1998; and para 432 ante.

17 *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] QB 613 at 622, [1975] 1 All ER 41 at 49-50.

18 *Lion Laboratories Ltd v Evans* [1985] QB 526 at 537, [1984] 2 All ER 417 at 423, CA.

19 *Hoechst UK Ltd v Chemiculture Ltd* [1993] FSR 270.

UPDATE

485 Just cause or excuse and public interest

NOTE 11--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

NOTE 14--Disclosure is not qualified by a requirement that the owner of the information be given an effective right to reply: *Tillery Valley Foods Ltd v Channel Four Television Corp* [2004] EWHC 1075 (Ch), (2004) Times, 21 May.

486. Evidential basis for the defence.

Full knowledge of the conduct believed to justify disclosure of confidential information is not required in order for the defence of just cause or excuse or public interest¹ to operate². In a rare situation where the defence might apply to media publicity for the work of the security services it has been said that a mere allegation is not sufficient but would have to be followed by investigations reasonably open to the recipient, which then (in the particular circumstances) rendered it a credible allegation from an apparently reliable source³. Otherwise, well-founded suspicion, not a mere roving suggestion or even a general suggestion⁴, will be required⁵.

1 See para 485 ante.

2 See notes 3-5 infra.

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 283, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 660, HL, per Lord Goff of Chieveley.

4 *Gartside v Outram* (1856) 26 LJCh 113 at 114.

5 *Malone v Metropolitan Police Comr* [1979] Ch 344 at 377, [1979] 2 All ER 620 at 646.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(12) DEFENCES/487. Extent of relaxation of the defence.

487. Extent of relaxation of the defence.

Even if the defence of just cause or excuse or public interest¹ operates to relax or negate an obligation of confidence, it may not justify full publicity; it will depend on the circumstances². For the security services, knowledge or suspicion of wrongdoing would, except in the rarest cases, justify complaints only within internal channels³. In other cases, complaints to those with authority to prevent or correct the wrongdoing or other unsatisfactory situation may be justified⁴, but where the public is being prejudiced or misled, full publicity in the media may be justified⁵.

1 See para 485 ante.

2 See notes 3-5 infra. Where a court determines that the public interest in disclosure for the purpose of litigation outweighs the public interest in maintaining confidentiality, stringent conditions may be imposed upon the manner and extent of disclosure: *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May.

3 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 282-283, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659-660, HL, per Lord Goff of Chieveley; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477 (any refusal of permission to disclose information to the proper authorities in accordance with the Official Secrets Acts 1911 to 1989 can be reviewed by the courts).

4 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 414, 416, [1984] 1 WLR 892 at 899, 902, CA (suspected racing irregularities might be revealed to police or Jockey Club). Crime should be revealed to the police or the Director of Public Prosecutions and breach of statutory duty should be revealed to the regulatory authority: *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405-406, [1967] 3 All ER 145 at 148, CA. However, some wrongdoing may justify going to the press, such as a misleading business practice or misleading conduct: *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA. See also *Church of Scientology v Kaufman* [1973] RPC 627 (affd (1972) 117 Sol Jo 72, CA) (interlocutory proceedings); *Church of Scientology of California v Kaufman* [1973] RPC 635 (trial of action) (medical hazard justified a book); *Lion Laboratories Ltd v*

Evans [1985] QB 526, [1984] 2 All ER 417, CA (defective breathalyser justified going to the press). An intended tort may be revealed to the prospective victim: see *Gartside v Outram* (1856) 26 LJCh 113.

5 *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA; *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA (media); *Church of Scientology v Kaufman* [1973] RPC 627 (affd (1972) 117 Sol Jo 72, CA) (interlocutory proceedings); *Church of Scientology of California v Kaufman* [1973] RPC 635 (trial of action).

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488. Unclean hands.

The maxim that 'he who comes to equity must come with clean hands' applies whenever a claimant seeks an equitable remedy for breach of confidence¹. For conduct to amount to having unclean hands it must be improper but not necessarily illegal and it must be more than an error of judgment². Whilst the defence is not dissimilar to the defence of just cause³ and the two defences may coincide in an individual case⁴, the just cause defence is primarily directed to the public interest and the unclean hands defence is directed to personal conduct; the attempted preservation of confidence by deplorable means by a claimant has been held to fall within this defence, the improper conduct being required to relate to the cause of action⁵. The defence is discretionary and when each party has been guilty of impropriety the court may, in the exercise of its discretion and on the balance of perfidy, grant remedies to a claimant who has been less guilty than the defendant⁶. Whilst impropriety may exclude present and future confidence it will not retroactively destroy past confidence⁷.

1 As to the maxim that he who comes to equity must come with clean hands see EQUITY.

2 *Stevenson Jordan & Harrison Ltd v Macdonald & Evans* (1951) 68 RPC 190 at 196; revsd on other grounds [1952] 1 TLR 101, 69 RPC 10, CA.

3 See para 485 ante.

4 *Church of Scientology of California v Kaufman* [1973] RPC 635 at 654-656.

5 *Hubbard v Vosper* [1972] 2 QB 84 at 101, [1972] 1 All ER 1023 at 1033, CA, cited in *Church of Scientology of California v Kaufman* [1973] RPC 635 at 656.

6 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611.

7 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611.

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489. Protection of legitimate interests.

A confidant may enjoy a restricted right to disclose confidences when defending legal or disciplinary proceedings brought against him¹.

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA; *Sunderland v Barclays Bank Ltd* (1938) 5 Legal Decisions Affecting Bankers 163 per Du Parcq LJ; *R v Institute of Chartered Accountants in England and Wales, ex p Brindle* [1994] BCC 297 at 312; *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 at 249 per Colman J; *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513. See also *Lillicrap v Nalder & Son (a firm)* [1993] 1 All ER 724, [1993] 1 WLR 94, CA (disclosure is confined to the instant case); *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272 (disclosure of arbitration agreement must be necessary for protection of rights of parties and not merely helpful); *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA (where an applicant seeks a wasted costs order against the lawyers on the other side, the respondent lawyers may not disclose privileged documents without their client's consent).

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NOTE 1--See *Westminster International BV v Dornoch* [2009] All ER (D) 37 (Sep), CA.

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490. Delay.

The maxim that 'equity aids the vigilant' applies to equitable remedies for breach of confidence¹. The operation of the defence may depend on the lapse of time being so long that it has led the defendant to believe that the claimant has acquiesced in the breach and in consequence has changed his position, or so long that it has led to the loss of evidence². However, delay will not be fatal to a claimant if, having objected to disclosure, he reserves his position until he has an opportunity to evaluate a disclosure he has been told will be made in the future³. Ignorance and incapacity will also explain delay⁴.

1 As to delay see CIVIL PROCEDURE vol 11 (2009) PARAS 374, 392, 460. As to acquiescence and laches see EQUITY.

2 *International Scientific Communications Inc v Pattison* [1979] FSR 429 (equitable remedy of account lost by delay but claimant recovered damages); *Prout v British Gas plc* [1992] FSR 478, Patents County Court (concession that delay defeated application for an injunction); *Faccenda Chicken Ltd v Fowler, Fowler v Faccenda Chicken Ltd* [1987] Ch 117 at 130-131, [1986] 1 All ER 617 at 621, CA (claim for injunction not pursued owing to lapse of time).

3 *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1 at 38, [1981] 2 All ER 321 at 346, CA (waiting to see film which would contain disclosures).

4 See *Rees v De Bernardy* [1896] 2 Ch 437; *Allcard v Skinner* (1887) 36 ChD 145.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/491. Search orders.

(13) REMEDIES

491. Search orders.

Search orders will be granted, subject to the usual conditions¹, at any stage in the proceedings, to enable the inspection of premises where there is strong evidence that infringing documents or articles may be found². The claimant may be allowed to inspect and photograph articles and documents relating to the right allegedly infringed and to remove articles and documents which belong to him³.

The order may be accompanied by an injunction restraining the defendant from altering or removing documents or articles covered by the order. The injunction must not be so wide in its terms as to restrain mere competition by former employees even if it would otherwise be difficult to quantify damages⁴. The claimant must normally give an undertaking in damages and if, because of the grant of an injunction too wide in its terms, the defendant is prevented from fulfilling existing orders, the claimant may be liable on the undertaking⁵.

Safeguards to avoid oppression in the execution of an order have been formulated by the court⁶. The claimant must make full disclosure of material facts⁷ but failure to advert to a legal conclusion which might have led to the exclusion of some of the evidence will not have an invalidating effect⁸.

1 Search orders were formerly called 'Anton Piller orders', following *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA. See CIVIL PROCEDURE vol 11 (2009) PARA 402 et seq. As to the power of the High Court to make an order, in the case of existing or proposed proceedings in the court, for preserving evidence or property see the Civil Procedure Act 1997 s 7; and CIVIL PROCEDURE vol 11 (2009) PARAS 318-319.

2 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, [1976] 1 All ER 779, CA; *EMI Ltd v Pandit* [1975] 1 All ER 418, [1975] 1 WLR 302; *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 69-76, [1986] 3 All ER 338 at 365-372; *Lock International plc v Beswick* [1989] 3 All ER 373, [1989] 1 WLR 1268.

3 *EMI Ltd v Pandit* [1975] 1 All ER 418, [1975] 1 WLR 302; *Roberts v Northwest Fixings* [1993] FSR 281, CA (list of customers removed). Where a claimant recovers property allegedly stolen from him by the defendant, the rule that documents obtained on the execution of a search order should not be used for purposes other than the litigation in which the order was made does not apply, and the claimant may disclose to the police the information that such property has been recovered from the defendant, but not the supervising solicitor's report: *Process Development Ltd v Hogg* [1996] FSR 45, CA.

4 *Roberts v Northwest Fixings* [1993] FSR 281, CA.

5 *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257, [1992] 1 WLR 840.

6 *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 at 275-276, [1992] 1 WLR 840 at 860-861.

7 *Lock International plc v Beswick* [1989] 3 All ER 373, [1989] 1 WLR 1268.

8 *Hoechst UK Ltd v Chemiculture Ltd* [1993] FSR 270.

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491 Search orders

NOTE 6--See *C plc v P (A-G intervening)* [2007] EWCA Civ 493, [2008] Ch 1, [2007] 3 All ER 1034 (court could modify application of domestic privilege against self-incrimination to exclude from its ambit material constituting free standing evidence not created by respondent to search order under compulsion).

492. Interim injunctions.

In view of the need for swift action to check disclosure, interim injunctions¹ are of special importance in cases of disclosure of confidential information. The general principles that there should be a serious question to be tried, and that the balance of convenience should be satisfied, apply². Applications for interim injunctions for breach of confidence must be considered also in the context of balancing the rights guaranteed by the Human Rights Act 1998, especially the right to privacy and the right to freedom of expression³. A wide variety of factors have been taken into account in the exercise of the court's discretion in granting such relief, including whether the claimant would be adequately compensated in damages if the injunction were refused⁴, or conversely whether the defendant would be adequately compensated on the undertaking in damages required of the claimant if the injunction were inappropriately granted⁵. The court will consider not only the nature of the case but also the financial ability of the parties to make compensation⁶.

The balance of harm may also be relevant. If the harm done to a defendant by closing his business would outweigh any harm done to the claimant by allowing continuance this will tell against the grant of an interim injunction⁷. The court may be readier to protect an existing product than a mere idea in which the creator had made no investment⁸. The market share or market position of the claimant may be such that to refuse any injunction would do him grave harm⁹. The preservation of the status quo may tell in favour of granting an injunction, but not if it would destroy the defendant's case¹⁰.

Where the public interest in the defence of the realm prevailed over the right of the public to be informed by the press, an injunction was extended to cover reports of court proceedings abroad¹¹. Where the public interest in the unreliability of a breathalyser which might lead to the conviction of the innocent prevailed over the public interest in preserving confidentiality, the injunction was discharged¹².

The court will be readier to grant an injunction where the claimant cannot be adequately compensated in damages¹³. In cases involving defamation¹⁴, an injunction will not normally be granted when the defendant intends to justify or plead fair comment¹⁵. The material to be protected must not be trivial tittle-tattle or otherwise worthless¹⁶, but if the importance of the material warrants it, a worldwide interim injunction may be granted¹⁷. If material is to be published in any event in the near future this will be a factor against granting the injunction, as commercial interest in delaying publication will not be enough to confer confidentiality¹⁸.

No injunction will be granted when there is inadequate particularity as to what material is confidential, even if the balance of convenience would otherwise favour an injunction¹⁹. An injunction may be varied or granted on appeal to define more clearly the trade secrets covered by it and may prevent a defendant from fulfilling orders, although the court should be cautious in interfering with the rights of innocent third parties²⁰. The injunction must be clear and definite in its terms so that the party to whom it is directed may know how it is to be observed²¹. No injunction will be granted to enforce an employee's covenant which is so widely drawn as to be unreasonable in covering matters in which the employee was not engaged or purporting to restrict his personal skill and knowledge²².

1 As to interim injunctions see CIVIL PROCEDURE vol 11 (2009) PARA 383 et seq.

2 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL.

3 *A v B plc* [2002] EWCA 337, [2003] QB 195, [2002] 2 All ER 545 (the rights to privacy and freedom of expression contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 8, 10 (as set out in the Human Rights Act 1998, Sch 1) provide new parameters for the court to decide actions for breach of confidence). As to the rights to privacy and freedom of expression generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

4 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408, [1975] 1 All ER 504 at 510, HL; *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429 at 433; *United Sterling Corpn Ltd v Felton* [1974] RPC 162 at 167-168; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (royalty on motorcycle engines to be paid into account to await outcome of trial); *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, [1981] 2 All ER 321, CA (bad publicity).

5 *Bostitch Inc v McGarry & Cole Ltd* [1964] RPC 173; *Lock International plc v Beswick* [1989] 3 All ER 373, [1989] 1 WLR 1268; *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, [2001] 1 FLR 982, CA (interim injunction restraining defendant from publishing 'unofficial' wedding photographs of celebrity couple discontinued because of potential difficulty in computing defendant's losses in monetary terms).

6 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408, [1975] 1 All ER 504 at 510, HL.

7 *Bostitch Inc v McGarry & Cole Ltd* [1964] RPC 173.

8 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 54.

9 *Brian D Collins (Engineers) Ltd v Charles Roberts & Co Ltd* [1965] RPC 429; and see *United Sterling Corpn Ltd v Felton* [1974] RPC 162.

10 *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1977] 1 Lloyd's Rep 505, CA (defendant unable to reinstate a take-over bid). Where there was no letter before action and there was delay after the issue of the writ before service, it was the time of service that fixed the status quo: *Graham v Delderfield* [1992] FSR 313, CA.

11 *A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL (further publicity involving the publishing of a security officer's memoirs would destroy all confidentiality in the material and deprive the Attorney General of any possibility of success at the trial).

12 *Lion Laboratories Ltd v Evans* [1985] QB 526, [1984] 2 All ER 417, CA.

13 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 415, [1984] 1 WLR 892 at 900, CA.

14 As to defamation see LIBEL AND SLANDER.

15 *Bonnard v Perryman* [1891] 2 Ch 269, CA; *Fraser v Evans* [1969] 1 QB 349, [1969] 1 All ER 8, CA; and see *Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA (case in substance involved defamation).

16 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48.

17 See *A-G v Barker* [1990] 3 All ER 257, CA (although the case was held to be one of breach of contract rather than confidentiality).

18 *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443, CA.

19 *Mainmet Holdings plc v Austin* [1991] FSR 538; *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 (the claimant must provide full and proper particulars of all the confidential information on which he relies so that an injunction is enforceable and of certain scope).

20 *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, [1989] ICR 123, CA; and see *PSM International v Whitehouse and Willenhall Automation* [1993] IRLR 279, CA.

21 See *Amway Corpn v Eurway International Ltd* [1974] RPC 82 at 86-87; *PA Thomas & Co v Mould* [1968] 2 QB 913, [1968] 1 All ER 963; *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, [1989] ICR 123, CA; *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443, CA.

22 *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA; *Technograph Printed Circuits Ltd v Chalwyn Ltd* [1967] RPC 339; *Austin Knight (UK) v Hinds* [1994] FSR 52.

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NOTE 3--As to the approach of the court when balancing the rights guaranteed under the European Convention on Human Rights to privacy and freedom of expression, see

X v Persons Unknown [2006] EWHC 2783 (QB), [2007] 3 FCR 223; and *LNS v Persons Unknown* [2010] EWHC 119 (QB), [2010] 1 FCR 659.

NOTE 17--See *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch), [2010] FSR 29, [2009] All ER (D) 57 (Oct).

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493. Final injunctions.

Final injunctions¹ may be granted subject to the ordinary principles of equitable relief in respect of both threatened² and actual³ breaches of confidence arising from any of the sources of jurisdiction on which an obligation of confidence may be founded⁴. The purpose of relief is to prevent the continuation of a breach of confidence rather than to stop the continued flow of wrongful benefit arising from breach⁵.

An injunction may be more readily granted in respect of personal information than in the case of trade secrets, the harm in the latter case being more readily assessed in monetary terms for an award of damages⁶. The terms of an injunction in respect of geographical area may also differ for these types of obligation⁷. The importance of the material will also be taken into account since the court will not protect trivial tittle-tattle⁸.

If the information has been so widely published or so extensively used that restraint would be of no practical benefit this will tell against the grant of an injunction, but if some element of restriction and confidence remains this may be protected⁹.

Another consideration is the extent to which possession of the confidential material would spare the defendant effort and expense in obtaining it by other means¹⁰.

The court will also consider the extent to which use was made of the confidential material by the defendant, since the greater the use the more ready the court will be to grant the injunction¹¹. If the defendant himself was responsible for disclosures which deprive the information of confidentiality, he may remain bound by the injunction even though all others are not bound¹². The court will be reluctant to grant broad general injunctions against a class of persons and a class of acts, even in aid of national security, since injunctions are normally aimed at the prevention of some specific wrong, not at the prevention of wrongdoing in general¹³. It would not be appropriate to subject a person to an injunction on the ground that he is the sort of person who is likely to commit some kind of wrong or that he has an interest in doing so¹⁴.

It is doubtful if, and to what extent, a claimant must prove detriment¹⁵. For personal confidences, it is enough if persons whom the claimant did not wish to know the information have obtained it, whether or not it is to his detriment¹⁶; and for medical professional confidences it is sufficient that those requiring treatment may be deterred from seeking it¹⁷. If information is disclosed in inconclusive negotiations, the recipient may not be obliged to avoid the topic or carry out parallel research, but instead to use the information on payment¹⁸. Account may be taken of good or bad faith on the part of the defendant but these factors will not necessarily be conclusive¹⁹. Unlawful conduct is not determinative of the decision to grant relief but may be a compelling factor when exercising discretion²⁰.

The injunction may be drawn to achieve a balance of justice, for example by including a time limit²¹, but it must be sufficiently certain in its terms to allow the defendant to know how it is to be observed²².

1 As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

2 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, [1965] 1 All ER 611; but cf *Lennon v News Group Newspapers Ltd and Twist* [1978] FSR 573, CA.

3 *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; cf *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL); *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605.

4 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); *Robb v Green* [1895] 2 QB 315, CA; *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207, CA; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293. See also para 403 ante.

5 *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289. As to circumstances where damages or the creation of a constructive trust are more suitable remedies see *Ocular Sciences Ltd v Aspect Vision Care Ltd* supra.

6 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 50. See also *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 415, [1984] 1 WLR 892 at 900, CA.

7 See *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 260, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 643, HL, per Lord Keith of Kinkel. The court has jurisdiction in exceptional cases to extend the protection of confidentiality, even to impose restrictions on the press permanently, including injunctions against the world, where serious consequences may result and relief is the only course of action open to the applicants: *Venables v News Group Newspapers* [2001] Fam 430, [2001] 1 All ER 908. See also *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] All ER (D) 282 (May) (order against the world granted in order to continue to protect the first claimant, who was convicted of the manslaughter of two children when aged 11, and the second claimant, her adult child, in respect of confidential information that might identify them).

8 See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48. See also *McNicol v Sportsman's Book Stores* (1930) [1928-1935] MacG Cop Cas 116 (cited in *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 149, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 574 per Scott J; and see at 282-284 and 659-660, HL, per Lord Goff of Chieveley); *Church of Scientology of California v Kaufman* [1973] RPC 635 at 658.

9 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL; *Gilbert v Star Newspaper Co Ltd* (1894) 11 TLR 4.

10 As to the 'springboard' doctrine see para 424 ante.

11 *Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461; *Peter Pan Manufacturing Corp v Corsets Silhouette* [1963] 3 All ER 402, [1964] 1 WLR 96. Conversely, if the contribution of the misused information is small it may be an award of damages only: *Bostitch Inc v McGarry & Cole Ltd* [1964] RPC 173; *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA; *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809; *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] 1 WLR 1; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293.

12 *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 260, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. This has been criticised as absurd, although it is recognised that damages and some restriction on use analogous to the 'springboard' doctrine may be appropriate: *A-G v Observer Ltd, A-G v Times Newspapers Ltd* supra per Lord Goff of Chieveley.

13 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 264, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 646, HL, per Lord Keith of Kinkel.

14 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 264, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 645-646, HL, per Lord Keith of Kinkel, with whom the majority agreed, though Lord Brightman was doubtful (see at 267 and 648). Once confidentiality had been lost, the collateral purposes of sustaining morale in the colleagues of the breaker of confidence and dissuading him from

further publication were not enough to justify the grant of a final injunction: *A-G v Observer Ltd, A-G v Times Newspapers Ltd* supra at 275-276 and 654 per Lord Keith of Kinkel.

15 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281-282, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659, HL, per Lord Goff of Chieveley, pointing out that in the case of governmental secrets the Crown has to establish not only breach of confidence but also that the breach is to its detriment in that there is a public interest in maintaining confidence. Detriment may be necessary in private law confidences: see *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260, CA; *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd* [1977] 1 Lloyd's Rep 505 at 509, CA. As to detriment see para 482 ante.

16 *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 255-256, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 639-640, HL, per Lord Keith of Kinkel; but contra at 270 and 650 per Lord Griffiths.

17 *X v Y* [1988] 2 All ER 648.

18 *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 49 (damages in lieu of an injunction).

19 *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA (subconscious plagiarism resulting in damages but no injunction); but see *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] RPC 61 (on appeal on the question of damages only [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL) (injunction granted against continued use of plans even though this was a mistake); *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] 1 WLR 1; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293 (injunction for conscious wrongful use unless it is trifling).

20 *A v B plc* [2002] EWCA 337 at [11](x), [2003] QB 195 at [11](x), [2002] 2 All ER 545 at [11](x).

21 See *Roger Bullivant Ltd v Ellis* [1987] ICR 464, [1987] FSR 172, CA (injunction not to extend beyond 'springboard' period).

22 *PA Thomas & Co v Mould* [1968] 2 QB 913, [1968] 1 All ER 963; *Amway Corp v Eurway International Ltd* [1974] RPC 82 at 87; *Potters-Ballotini Ltd v Weston-Baker* [1977] RPC 202 at 206, CA; *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA; *Mainmet Holdings plc v Austin* [1991] FSR 538; *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443, CA. An injunction may be varied on appeal to define more clearly trade secrets covered by it: *PSM International v Whitehouse and Willenhall* [1992] IRLR 279, CA. A number of the authorities involve interim injunctions but the same principle applies: see *Lock International plc v Beswick* [1989] 3 All ER 373, [1989] 1 WLR 1268; *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, [1989] ICR 123, CA; *Maudsley v Palumbo* [1995] TLR 690.

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494. Declaration.

A declaratory judgment may be available to determine the existence or otherwise of an obligation of confidence and its scope¹. Whilst an injunction will not lie against the Crown, the court may make an order declaratory of the parties' rights².

1 *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, (1991) Times, 30 October (claimant not precluded by its duty of confidentiality from supplying information to a non-statutory inquiry into the regulation and supervision of an authorised banking institution).

2 See the Crown Proceedings Act 1947 s 21; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) para 134.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/495. Delivery up and destruction.

495. Delivery up and destruction.

Orders for delivery up or destruction of documents, articles or machinery obtained or made in breach of confidence will be made to give full effect to prohibitory injunctions¹. An order is discretionary and is made under the inherent jurisdiction of the court; and the processes directed must be carried out on oath². Delivery up will be ordered when the claimant is the owner of the infringing articles or documents³; and destruction will be ordered when the documents or articles, such as copies, are the property of the defendant⁴. Where the defendants fully appreciate their obligations, the protected information makes an important contribution to what they are producing, and an award of damages will not suffice, the court may order the destruction of machinery used to produce infringing articles or such articles⁵. In a less serious case damages may be awarded⁶.

1 As to injunctions see paras 492-493 ante.

2 *Prince Albert v Strange* (1849) 2 De G & Sm 652 (on appeal (1849) 1 Mac & G 25); cf *Industrial Furnaces Ltd v Reaves* [1970] RPC 605 at 627-628 per Graham J (order for delivery up of documents, rather than for their destruction on oath, as the court took the view that the defendant was not to be relied on); see EQUITY.

3 *Evitt v Price* (1827) 1 Sim 483; *Alperton Rubber Co v Manning* (1917) 86 LJCh 377 (books removed by employees). Delivery up may be ordered even if the defendant has added confidential material of his own: *Industrial Furnaces Ltd v Reaves* [1970] RPC 605 at 628; and see note 2 supra. For a case where both delivery up and destruction were ordered see *Prince Albert v Strange* (1849) 2 De G & Sm 652; on appeal (1849) 1 Mac & G 25.

4 See *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

5 *Reid & Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461.

6 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n at 415, 65 RPC 203 at 219, CA. See also the Supreme Court Act 1981 s 50 (which is derived from the Chancery Amendment Act 1858 (Lord Cairns' Act) s 2); and DAMAGES vol 12(1) (Reissue) para 825.

UPDATE

495 Delivery up and destruction

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/496. Damages.

496. Damages.

Damages may be awarded on ordinary common law principles for breaches of confidence arising from obligations in contract, tort and property¹ and under the jurisdiction originally conferred by Lord Cairns' Act in addition to, or in substitution for, an injunction². Damages have been awarded for the breach of an equitable obligation of confidence in order to avoid wasteful

destruction of otherwise useful property³. On the wording of the current legislation it is enough to ground an award in substitution if the court has power to entertain an application for an injunction⁴. It would not seem necessary that the court be satisfied that all the conditions for the grant of an injunction should be fulfilled⁵.

When an injunction is granted to enforce a purely equitable obligation of confidence, damages may be awarded in addition to the injunction⁶. As damages may be awarded in substitution for an injunction which secures the claimant against a future apprehended loss, such damages may be awarded in respect of prospective breaches of confidence⁷. Where there is an established breach of confidence, damages can be awarded in lieu for both past and future losses⁸. It is doubtful if there is an inherent jurisdiction to award damages in equity⁹. Many authorities are not explicit as to the basis of an award and almost all of those dealing with breach of confidence can be explained under the statutory jurisdiction to award damages in addition to, or substitution for, an injunction or a claim for specific performance created by Lord Cairns' Act¹⁰. However, the court has refused to strike out a claim for damages even though there appeared to be no common law ground such as contract and no injunction was claimed¹¹. It is also doubtful whether equitable compensation can be claimed for breach of confidence¹².

On assessment of damages in a case involving licensing of confidential information it has been said that if there is 'nothing very special' about the information, it being such as could be obtained from a competent consultant, damages should be the amount of his fee; but if it is 'something special' as, for instance, where it involves an inventive step, then the amount of damages should be the price which would be paid by a willing buyer to a willing seller; and if it is 'very special' then damages should be the capitalised value of a royalty¹³. In arriving at the willing seller's price the special circumstances of the claimant are to be taken into account¹⁴. By analogy with conversion¹⁵ it was further said that when damages were satisfied the information would become the property of the defendant to exploit as he wished and he could patent it¹⁶, in which case it remains doubtful whether the successful claimant could still utilise the information; if it were patented by the defendant it would seem that he could not. This approach has been criticised for laying undue stress on the benefit to the defendant and the reversal of unjust enrichment rather than on the compensation for loss suffered by the claimant. Where, however, the claimant is a manufacturer who would not have licensed the information, it has been held, following the rule for economic torts¹⁷, that the proper measure of damages is the claimant's loss of profits on sales¹⁸. The authorities cover commercial and industrial confidences and there is little guidance on damages for breach of personal confidence¹⁹. Where an injunction and damages are awarded and an inquiry as to damages is ordered, this need not be limited to breaches proved or admitted at the trial but may extend to the same field as the injunction²⁰. Damages will normally be assessed from the day of the breach unless this would work injustice, in which case the date of the hearing may be taken²¹.

1 See DAMAGES vol 12(1) (Reissue) para 851 et seq.

2 See the Chancery Amendment Act 1858 (Lord Cairns' Act) s 2 (repealed). See now the Supreme Court Act 1981 s 50; and DAMAGES vol 12(1) (Reissue) para 825.

3 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n at 415, 65 RPC 203 at 219, CA.

4 See the Supreme Court Act 1981 s 50; and note 2 supra.

5 As to the conditions for the grant of an injunction see CIVIL PROCEDURE.

6 *London and Provincial Sporting News Agency Ltd v Levy* (1928) [1923-1928] MacG Cop Cas 340; *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272 (on appeal [1957] RPC 207, CA) (decided in contract), where claimants were required to elect, for the purposes of an inquiry as to damages, to pursue damages either for breach of copyright or for breach of confidence, but not both; *Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293; *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96 (order for account of profits rather than damages).

7 See CIVIL PROCEDURE vol 11 (2009) PARA 364 et seq. See also *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895, HL; *Surrey County Council v Bredero Homes Ltd* [1992] 3 All ER 302 at 309-310.

8 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n at 415, 65 RPC 203 at 219, CA. Damages may be more appropriate where confidentiality is destroyed and loss can be proved: *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289.

9 See *Todd v Gee* (1810) 17 Ves 273; *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406.

10 See generally SPECIFIC PERFORMANCE.

11 *Stephens v Avery* [1988] Ch 449, [1988] 2 All ER 477 (but amendment of pleadings might cover this).

12 See para 406 note 15 ante.

13 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA.

14 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718 at 720, [1969] 1 WLR 809 at 813, CA, per Lord Denning MR. No clear indication was given of the time over which the royalty was to be capitalised. As Lord Denning MR later referred to the possibility of the defendant patenting the information, the court may have had the patent period in mind.

15 As to conversion see para 405 ante; and TORT vol 45(2) (Reissue) PARA 548 et seq.

16 *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718 at 720-721, [1969] 1 WLR 809 at 813, CA, per Lord Denning MR. As to patents generally see PATENTS AND REGISTERED DESIGNS.

17 See *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 2 All ER 173 at 177, [1975] 1 WLR 819 at 824, HL, per Lord Wilberforce.

18 *Dowson & Mason Ltd v Potter* [1986] 2 All ER 418 [1986] 1 WLR 1419, CA, distinguishing *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA. The Supreme Court of Canada has characterised a claimant's loss as equivalent to the value of a lost market opportunity stemming from unfair competition in having his know-how, imparted in confidence, used against him: *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577, [2000] FSR 491, Can SC.

19 See *Beloff v Pressdram Ltd* [1973] 1 All ER 241 (which, however, was pleaded in copyright).

20 *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd without considering this point sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL.

21 See *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL (a case concerning damages for breach of a contract to sell land).

UPDATE

496 Damages

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/497. Account of profits.

497. Account of profits.

Account of profits is a discretionary equitable remedy which assumes that the defendant has profited from the misuse of confidential information and that he should be deprived of those

profits for the benefit of the claimant¹. Whilst damages or an order for account of profits can be awarded with either an injunction or an order for delivery, damages and account of profits cannot both be awarded in the same action². Account of profits can be used as a remedy not only for breach of an equitable obligation but also for breach of contract³ or bailment⁴.

The ascertainment of the amount of accountable profits may be prolonged and, in practice, damages are normally preferred⁵. Damages may also be appropriate where the information made only a restricted contribution to what the defendant did, whereas when he acted with full knowledge and the information made a major contribution, the claimant has been allowed to make an election between an account of profits and damages⁶. When the information is essential to the defendant he will be required to account for the total profits accrued⁷. If, however, the defendant could have obtained the information by independent research and the breach merely saved work and expense, then it may be that an apportionment should be made by comparing what the defendant would have spent acting independently and what he in fact spent because of the breach; the accounting would then be confined to the difference⁸.

1 See EQUITY.

2 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96 (injunction, destruction and account); *Industrial Furnaces Ltd v Reaves* [1970] RPC 605 (injunction, delivery up and damages).

3 Cases on agency support this: see *Beaumont v Boulbee* (1802) 7 Ves 599; *Mackenzie v Johnston and Meaburn* (1819) 4 Madd 373; *Parker v McKenna* (1874) 10 Ch App 96 (directors acting as agents of bank). See also *A-G v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, [2000] 4 All ER 385, HL; and para 404 note 6 ante.

4 As to a reasonable fee for use see para 463 text to notes 18-19 ante. As to bailment see paras 408, 463 ante; and BAILMENT.

5 *Siddell v Vickers* (1892) 9 RPC 152 at 162, CA; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 286, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 662, HL, per Lord Goff of Chieveley (account ordered against newspaper publishing in breach of confidence). Where a defendant has acted innocently the court may either award damages (see *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA (subconscious plagiarism not making very substantial contribution; not a case for injunction or account but damages)), or, presumably, limit accounting to the period after the defendant had notice that he was infringing confidence.

6 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96 (election allowed); *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL (account ordered against newspaper publishing with full knowledge).

7 *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

8 *Siddell v Vickers* (1892) 9 RPC 152 (patent), distinguished in *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/498. Recovery of bribe.

498. Recovery of bribe.

If an agent¹, employee² or other fiduciary³ abuses a position of confidence by accepting a bribe⁴, the employer or principal may summarily dismiss that person⁵, refuse payment of remuneration and indemnity⁶ and recover the amount of the bribe if it has been paid to the agent or employee, whether or not any loss has been suffered⁷. If the bribe has not been paid, the

employee or agent cannot recover it from the promisor⁸, but if it has been paid the employer or principal can recover it⁹. If the employee or agent has been instrumental in entering into some associated transaction with the promisor on behalf of the employer or principal, that transaction can be avoided by the employer or principal¹⁰. The employer or principal may sue the agent and third party as jointly and severally liable for the bribe and for any additional loss that he may have suffered, but he must elect between recovery of the bribe and recovery of damages¹¹. Older authority indicates that the third party would be fully liable without any deduction for recovery from the agent¹² but this has now been disapproved¹³. The employee or agent holds the amount of the bribe (and any property representing the bribe or in which the bribe has been invested) in trust for the employer or principal¹⁴. The principal's entitlement to recover the property which represents an original bribe is not limited to the amount of the bribe but extends to the whole of that property¹⁵. Interest is payable from the date when the bribe was received¹⁶.

1 See *Swale v Ipswich Tannery Ltd* (1906) 11 Com Cas 88; and see *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Temperley v Blackrod Manufacturing Co Ltd* (1907) 71 JP Jo 341. As to agents see para 457 ante; and AGENCY.

2 See *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA.

3 A wide meaning has been given to 'fiduciary' in this context: see *Reading v A-G* [1951] AC 507 at 516, [1951] 1 All ER 617 at 620, HL. For the meaning of 'bribe' see *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573; *Taylor v Walker* [1958] 1 Lloyd's Rep 490. As to fiduciaries' obligations of confidence see para 455 ante. As to fiduciary relationships generally see EQUITY.

4 As to bribery see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 527 et seq. See also AGENCY vol 1 (2008) PARA 91 et seq.

5 A servant or agent who accepts a bribe need not have been influenced nor to have departed from duty; acceptance suffices: *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549; and see *Shipway v Broadwood* [1899] 1 QB 369, CA; *Re Debtor (No 229 of 1927)* [1927] 2 Ch 367. As to summary dismissal see EMPLOYMENT vol 40 (2009) PARA 700 et seq.

6 *Andrews v Ramsay & Co* [1903] 2 KB 635; *Nicholson v J Mansfield & Co* (1901) 17 TLR 259. Other untainted transactions are unaffected: *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA.

7 *Reading v A-G* [1951] AC 507, [1951] 1 All ER 617, HL.

8 See *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549.

9 See *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573.

10 *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) 10 Ch App 515; *Taylor v Walker* [1958] 1 Lloyd's Rep 490.

11 *Mahesan v Malaysian Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

12 *Salford Corpn v Lever* [1891] 1 QB 168, CA; *Hovenden & Sons v Millhoff* (1900) 83 LT 41, CA; *Morgan v Elford* (1876) 4 ChD 352, CA; *Phosphate Sewage Co v Hartmont* (1877) 5 ChD 394, CA; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, CA.

13 *Mahesan v Malaysian Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, [1978] 2 All ER 405, PC.

14 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC, doubting *Lister & Co v Stubbs* (1890) 45 ChD 1.

15 *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC.

16 *Nant-y-glo and Blaina Iron Works Co v Grave* (1878) 12 ChD 738.

UPDATE

498 Recovery of bribe

NOTES 14, 15--See *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119; and TRUSTS vol 48 (2007 Reissue) PARA 697.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(13) REMEDIES/499. Constructive trust.

499. Constructive trust.

Whilst a constructive trust¹ may in some circumstances be appropriate to enforce an obligation of confidence², there must be a fiduciary relationship between the parties giving rise to duties of loyalty and fidelity³, and this will not be so if the parties are at arm's length in the market⁴. Where an employee of a defendant misuses information supplied in confidence to the employer, the appropriate course is to sue for breach of confidence⁵.

1 As to constructive trusts generally see TRUSTS vol 48 (2007 Reissue) para 687 et seq.

2 *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, [1990] FSR 441, Can SC (where parties proposing a joint venture or partnership (as to which see para 459 ante) undertook exploratory drilling for minerals but then parted and the defendant, using the claimant's confidential information, successfully bid against the claimant for adjacent land, the defendant held the land on constructive trust for the claimant); cf *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 289-292, [1992] 4 All ER 385 at 402-404 per Millett J (affd [1991] Ch 547, [1992] 4 All ER 451, CA). See also *Satnam Investments Ltd v Dunlop Heywood and Co Ltd* [1999] 3 All ER 652, CA (no constructive trust where the recipient of information did not act dishonestly).

The imposition by the court of a constructive trust as a remedy (rather than the court's acknowledgement that such a trust has arisen by operation of law) has not been recognised explicitly in English law (see TRUSTS vol 48 (2007 Reissue) para 688) but see *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, where the remedial constructive trust appears to have been acknowledged, although on the facts no trust was imposed ('the imposition of a constructive trust is part of the equitable armoury of the court': see at 416 per Laddie J).

3 *Indata Equipment Supplies Ltd (t/a Autofleet) v ACL Ltd* [1998] 1 BCLC 412, [1998] FSR 248, CA. As to fiduciaries' obligations of confidence see para 455 ante. As to fiduciary relationships generally see EQUITY.

4 *Indata Equipment Supplies Ltd (t/a Autofleet) v ACL Ltd* [1998] 1 BCLC 412, [1998] FSR 248, CA (relationship of broker and finance house did not belong to the fiduciary categories).

5 *Indata Equipment Supplies Ltd (t/a Autofleet) v ACL Ltd* [1998] 1 BCLC 412, [1998] FSR 248, CA. As to employees' obligations of confidence see para 431 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(14) EVIDENCE AND PROCEDURE/500. Defamation and confidentiality.

(14) EVIDENCE AND PROCEDURE

500. Defamation and confidentiality.

A claim that communications are confidential will not of itself confer any immunity in defamation¹, although the proven existence of a confidential relationship may assist to demonstrate a reciprocity of duty and interest² or mutual interest³ to sustain a defence of qualified privilege. However, the test of what peripheral matters could be published on a qualified privilege public interest defence in a defamation claim is not applicable to public interest justification in a breach of confidence claim⁴.

1 *Brooks v Blanshard* (1833) 1 Cr & M 779 at 783 (letter for which privilege was claimed but denied); and see *Picton v Jackman* (1830) 4 C & P 257 (conversation 'confidential'). As to defamation generally see LIBEL AND SLANDER.

2 *Watt v Longsdon* [1930] 1 KB 130, CA; *Todd v Hawkins* (1837) 8 C & P 88 (relative warning about fiancé); *Stuart v Bell* [1891] 2 QB 341, CA (host warning guest); *Kelly v Partington* (1833) 4 B & Ad 700 (former employer giving reference). As to character references see EMPLOYMENT vol 40 (2009) PARA 681.

3 *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662 (trustee at friendly society meeting); *Hunt v Great Northern Rly Co* [1891] 2 QB 189, CA.

4 See *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.

UPDATE

500 Defamation and confidentiality

NOTE 4--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(14) EVIDENCE AND PROCEDURE/501. Evidential privilege.

501. Evidential privilege.

Confidentiality does not of itself confer any evidential privilege¹ and hence, in general, confidential communications may be subject to disclosure². This is true of personal, commercial, industrial and the majority of professional confidences³, but confidential information or material covered by legal professional privilege and public interest immunity are wholly or partly exempt from disclosure⁴. Whilst confidentiality is not a separate head of privilege it may be a material consideration when privilege is claimed on the ground of public interest⁵ and may be significant even when there is no privilege⁶. It has been held that general disclosure of confidential documents should not be made on the ground of relevance alone unless it is necessary for disposing fairly of the case⁷. The court should inspect the documents and consider covering up or, in rare cases, hearing in camera⁸.

Legal professional privilege exists between a client and his solicitor, barrister or foreign legal adviser⁹ in respect of communications seeking legal advice¹⁰, provided they are not directed to the commission of crime or fraud¹¹. There need not be a retainer¹², nor need litigation be contemplated¹³. Documents and communications made for pending or contemplated litigation are also privileged; this is not confined to communications between a solicitor and a barrister but extends to those between a solicitor and a witness¹⁴, between a party and a person instructed to report on the cause of an accident¹⁵, and between a party and a patent agent or registered trade mark agent¹⁶. Privilege is confined to communications and does not extend to facts arising in the context of the relationship between the client and the adviser or another

relationship¹⁷. The privilege is that of the party, and the party alone can waive it¹⁸, but if an opponent can produce secondary evidence of the privileged material this will be admitted¹⁹.

There appears to be no absolute confidentiality in statements made to prosecuting authorities under caution²⁰.

Public interest immunity covers not only official secrets and Cabinet minutes²¹, but a wider class of material where the courts will endeavour to balance the interest in confidence and the ministerial claim to immunity against the interest that justice should not be restricted by the withholding of evidence²². A party seeking disclosure must show that the material sought is likely to support him on an issue and that without it the party would be deprived of proper representation²³. Disclosure of material probably already publicly available may be refused since it would not assist the claimant²⁴. Public interest immunity is not confined to the Crown, government departments and the police²⁵ but may sometimes be claimed between parties²⁶. Thus it was held to apply when the protection of the anonymity of informants would help to maintain the supply of relevant information on cruelty to children to an organisation authorised by Parliament to take proceedings on their behalf²⁷; but confidential reports by a bank to regulatory authorities relating to its private client operations would not, as a class, be entitled to public interest immunity, since a heavy onus lies on a person seeking to assert a new class claim to such immunity²⁸.

There is no specific privilege for bank accounts²⁹ or for documents previously disclosed voluntarily in arbitration proceedings³⁰.

1 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405 at 433, [1973] 2 All ER 1169 at 1184, HL, per Lord Cross of Chelsea. See also *D v NSPCC* [1978] AC 171 at 218, 230, 238-239, 245, [1977] 1 All ER 589 at 594, 604-605, 612, 615, 618, HL; *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028 at 1065, 1070-1072, 1074-1078, 1080-1081, 1087, [1979] 3 All ER 673 at 679, 684-685, 686, 691-693, 697, HL.

2 As to disclosure generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

3 *W v Egdell* [1990] Ch 359 at 419, [1990] 1 All ER 835 at 848-849, CA, per Bingham LJ, citing *A-G v Mulholland* [1963] 2 QB 477, 489-490, [1963] 1 All ER 767 at 771, CA; *Chantrey Martin & Co v Martin* [1953] 2 QB 286, [1953] 2 All ER 691, CA; *Parry-Jones v Law Society* [1969] 1 Ch 1, [1968] 1 All ER 177, CA; *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414, DC; *Tourmier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 473, 486, CA.

4 As to legal professional privilege see CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) para 1479; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146. As to public interest immunity see CIVIL PROCEDURE vol 11 (2009) PARAS 574-579. A client suing a solicitor impliedly waives privilege in respect of all relevant matters, including files of other solicitors formerly retained by him that are now held by his present solicitors: *Kershaw v Whelan* [1996] 2 All ER 404, [1996] 1 WLR 358.

5 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405 at 433, [1973] 2 All ER 1169 at 1184, HL, per Lord Cross of Chelsea.

6 *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028, [1979] 3 All ER 673, HL.

7 *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028 at 1066, [1979] 3 All ER 673 at 680, HL.

8 *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028 at 1073, 1085, [1979] 3 All ER 673 at 685, 695, HL.

9 *Re Duncan, Garfield v Fay* [1968] P 306, [1968] 2 All ER 395.

10 See note 4 supra.

11 *R v Cox and Railton* (1884) 14 QBD 153, CCR; *Williams v Quebrada Rly, Land and Copper Co* [1895] 2 Ch 751.

12 See *Calcraft v Guest* [1898] 1 QB 759 at 761, CA; *Minter v Priest* [1930] AC 558, HL.

13 *Wheeler v Le Marchant* (1881) 17 ChD 675, CA (but a communication by a third party to the solicitor will not be privileged).

14 *Friend v London, Chatham and Dover Rly Co* (1877) 2 ExD 437, CA; *Southwark Water Co v Quick* (1878) 3 QBD 315, CA.

15 But only if the dominant purpose of the report was to obtain legal advice: *Waugh v British Railways Board* [1980] AC 521, [1979] 2 All ER 1169, HL.

16 See the Copyright, Designs and Patents Act 1988 s 280 (as amended); the Trade Marks Act 1994 s 87; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 535, 618; TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) para 34.

17 *Brown v Foster* (1857) 1 H & N 736; *Dwyer v Collins* (1852) 7 Exch 639 (possession of books and documents); *Conlon v Conlons Ltd* [1952] 2 All ER 462, [1952] WN 403, CA (whether solicitor had been authorised to negotiate a settlement before issue of the writ).

18 *Wilson v Rastall* (1792) 4 Term Rep 753; *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, HL. If a client sues the solicitor the privilege is waived: *Kershaw v Whelan* [1996] 2 All ER 404, [1996] 1 WLR 358.

19 *Calcraft v Guest* [1898] 1 QB 759, CA. Secondary evidence will not, however, be admitted if it was obtained by a trick: *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431, [1982] 2 All ER 241. Secondary evidence obtained by accident or mistake may be used for a prosecution since the need to enforce criminal law overrides a private claim to confidence: *Butler v Board of Trade* [1971] Ch 680 at 691, [1970] 3 All ER 593 at 600 per Goff J (solicitor handing over copy of privileged letter). This does not apply in civil cases where the court will use its equitable powers to prevent a party taking advantage of a clear mistake in disclosing privileged documents: *Derby & Co Ltd v Weldon (No 8)* [1990] 3 All ER 762, [1991] 1 WLR 73, CA; *English and American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232; *Abilit v Mills & Reeve (a firm)* (1995) Times, 25 October. But see *Kenning v Eve Construction Ltd* [1989] 1 WLR 1189 (copy of a report by an expert witness sent to claimants, and a confidential letter from the expert to the defendants accidentally included; the letter could be used).

20 See *Bunn v British Broadcasting Corp* [1998] 3 All ER 552; *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177, [1998] 4 All ER 801, HL; *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, CA (comments made during interview remained confidential even if not used in criminal proceedings). Cf *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May (confidentiality of statements made under caution to police officers by prison officers suspected of assaulting prisoners outweighed by public interest in allowing prisoners to pursue personal injury claims on the basis of all relevant material).

21 See *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL; and note 4 supra.

22 See *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL; *Burmah Oil Co Ltd v Bank of England (A-G intervening)* [1980] AC 1090, [1979] 3 All ER 700, HL.

23 *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394, [1983] 1 All ER 910, HL.

24 *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394, [1983] 1 All ER 910, HL.

25 *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL. A class claim to public interest immunity for evidence relating to an investigation under the Police and Criminal Evidence Act 1984 Pt IX (ss 83-112) (ss 83-106 repealed; s 108 partially repealed; ss 109-112 repealed) has been rejected, but a contents claim can be made for specific documents: *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL. Confidentiality between the police and the owners of seized documents is not, of itself, enough to prevent their production on a witness summons to the police; there must be a recognised head of privilege, such as legal professional privilege: *Marcel v Metropolitan Police Comr* [1992] Ch 225, [1992] 1 All ER 72, CA.

26 *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL.

27 See *D v NSPCC* [1978] AC 171, [1977] 1 All ER 589, HL.

28 *Kaufmann v Credit Lyonnais Bank* (1995) Times, 1 February; and see *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1994] 3 All ER 420, HL.

29 *Robertson v Canadian Imperial Bank of Commerce* [1995] 1 All ER 824, [1994] 1 WLR 1493, PC. As to bankers' obligations of confidentiality see para 454 ante.

30 *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 1 All ER 1056, [1988] 1 WLR 946 per Webster J. As to arbitrators' obligations of confidentiality see para 467 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/1. CONFIDENCE/(14) EVIDENCE AND PROCEDURE/502. Restriction of disclosure in litigation.

502. Restriction of disclosure in litigation.

In enforcing obligations of confidence by litigation, particularly in relation to trade secrets, the degree of disclosure required may defeat the purpose of the process. In some cases the courts have been prepared to accept restricted disclosure¹ but this appears inconsistent with the procedural requirements for disclosure, with the principles for the framing of injunctions, and with other authorities². The court has discretion in relation to disclosure and may direct either that information be disclosed only to the legal advisers of the parties and their experts, or that documents be partially covered to conceal confidential material³. In order to prevent the confidences allegedly infringed from being made publicly available in court and thereby destroying the subject matter of the proceedings, the court can direct that the trial be held in camera⁴. If the court has no jurisdiction at the trial of the action or at the effective hearing of an interim application to refuse to allow a party to proceedings to see evidence on which the other party relies, so also a party against whom an injunction is granted without notice must be entitled to see the evidence on which the injunction was granted, so that he can consider whether he can and should apply to discharge it⁵.

A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where: (1) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (2) the court gives permission; or (3) the party who disclosed the document and the person to whom the document belongs agree⁶. Documents remain confidential if no trial takes place⁷. However, when an action was compromised, an implied undertaking not to use documents produced under compulsion was held to cover witness statements but not experts' reports⁸. The court, having no absolute duty of confidentiality, can release or modify an implied undertaking not to disclose confidential information, if the public interest requires it and in the absence of any statutory rule prohibiting or restricting disclosure⁹.

1 *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239; *Under Water Welders and Repairers Ltd v Street and Longthorne* [1968] RPC 498. See also *Frankson v Home Office* [2003] EWCA Civ 655, [2003] All ER (D) 80 (May), (2003) Times, 12 May (where a court determines that the public interest in disclosure for the purpose of allowing claimants to pursue litigation outweighs the public interest in maintaining confidentiality, stringent conditions may be imposed upon the manner and extent of disclosure).

2 *Suhner & Co AG v Transradio Ltd* [1967] RPC 329; *Diamond Stylus Co Ltd v Bauden Precision Diamonds Ltd* [1973] RPC 675; *John Zink Co Ltd v Lloyds Bank Ltd and Airoil Burner Co (GB) Ltd* [1975] RPC 385; *GD Searle & Co Ltd v Celltech Ltd* [1982] FSR 92, CA. See also *PA Thomas & Co v Mould* [1968] 2 QB 913, [1968] 1 All ER 963. As to injunctions see paras 492-493 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to disclosure generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

3 *Science Research Council v Nassé, Leyland Cars (BL Cars Ltd) v Vyas* [1980] AC 1028, [1979] 3 All ER 673, HL; *Church of Scientology of California v Department of Health and Social Security* [1979] 3 All ER 97, [1979] 1 WLR 723, CA; *Sorbo Rubber Sponge Products Ltd v Defries* (1930) 47 RPC 454; *Pharaon v BCCI* [1998] 4 All ER 455 (only those parts of the documents that were relevant to the parties or to the issues in the case should be disclosed, the rest being redacted).

4 *Yates Circuit Foil Co v Electrofoils Ltd* [1976] FSR 345 at 346; *Industrial Furnaces Ltd v Reaves* [1970] RPC 605. The court will not mention secret processes in the judgment: see *Yates Circuit Foil Co v Electrofoils Ltd* supra. The publication of information relating to proceedings before any court sitting in private is not of itself contempt of court except where the information relates to a secret process, discovery or invention which is in issue in the proceedings: *Administration of Justice Act 1960* s 12(1)(d). As to the exclusion of the public see also *Scott v Scott* [1913] AC 417 at 437-443, HL, per Viscount Haldane LC. As to contempt of court see CONTEMPT OF COURT.

5 *VNU Publications Ltd v Ziff Davis (UK) Ltd* [1992] RPC 269 at 275 per Vinelott J (disclosure merely to the defendant's legal advisers was insufficient; the defendant was entitled to see all the evidence and comment on or challenge it; the case was not analogous to discovery where the courts restrict inspection of documents to counsel, solicitors and expert advisers); and see *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All ER 589, [1983] 1 WLR 721, CA (on an application for an ex parte order a judge should not hear confidential information which will not be made available to the defendant at a later stage).

6 CPR 31.22(1). Either a party or any person to whom the document belongs may apply to the court to make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public: CPR 31.22(2). An application for such an order may be made either by a party or by any person to whom the document belongs: CPR 31.22(3). These provisions reversed the effect of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, sub nom *Home Office v Harman* [1982] 1 All ER 532, HL (third party restrained from making use of documents read out in court for any purpose other than the action for which it was disclosed). See also *Riddick v Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA; *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd, Distillers Co (Biochemicals) Ltd v Phillips* [1975] QB 613, [1975] 1 All ER 41; *Sybron Corp v Barclays Bank plc* [1985] Ch 299 (documents produced on discovery not to be used in other proceedings without leave of the court although information from the court record could be used). The prohibition in CPR 31.22 is as to use of the disclosed documents, and a breach of this prohibition may not necessarily involve a breach of confidence: *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 2 at [4], [2002] 1 WLR 2253 at [4].

7 *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, CA.

8 *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, [1991] 1 WLR 756.

9 *A v A (ancillary relief), B v B* [2000] 1 FCR 577, [2000] 1 FLR 701. The lack of an absolute duty of confidentiality has been held to apply to proceedings in the Family Division, but every case should be considered on its merits, and the administration of justice is more likely to be prejudiced by subsequent publication where the proceedings involve children or personal financial matters than those involving unmarried or childless couples: *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [2002] 1 All ER 865.

UPDATE

502 Restriction of disclosure in litigation

NOTE 6--See *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 11 (Ch), [2006] IP & T 583 (claim against newspaper for breach of confidentiality in publishing extracts from personal journals; arguable case made that journals contained private confidential information of a sensitive nature; order made restraining publication or disclosure of specified information and identity of journals until judgment given).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(1) INTRODUCTION/503. The legislation.

2. DATA PROTECTION

(1) INTRODUCTION

503. The legislation.

The Data Protection Act 1998 implements the Data Protection Directive¹, whose purpose is to harmonise data protection legislation throughout the European Union in order to protect the fundamental rights and freedoms of the individual, in particular the right to privacy with respect to the processing of personal data, and to facilitate the free flow of personal data within the European Union². The Data Protection Act 1998 replaces the Data Protection Act 1984 and the Access to Personal Files Act 1987³. The Data Protection Act 1998 establishes a system of data protection controls for manual data as well as computerised data⁴; ensures that personal data is used in accordance with the data protection principles⁵; attaches certain conditions to the processing of personal data and adds extra safeguards where the personal data is considered sensitive⁶; establishes certain rights of the data subject⁷; and establishes a framework of notification and enforcement⁸. It also makes transitional provisions⁹.

Separate provision is made: (1) for the processing of personal data and the protection of privacy in the electronic communications sector¹⁰; and (2) with regard to the control of patient information¹¹.

1 1e EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

2 See *ibid* art 1.

3 The Data Protection Act 1998 also supplants for most purposes (but not all) the Access to Health Records Act 1990: see paras 428, 440 ante.

4 For the meaning of 'data' for the purposes of the Data Protection Act 1998 see para 506 post. With effect from 30 November 2005, the scope of the Data Protection Act 1998 is to extend to most types of data held by public authorities: see para 532 post.

5 As to the data protection principles see para 507 et seq post.

6 See paras 509-510 post.

7 See para 524 et seq post.

8 See para 537 et seq post. The requirement that any notice, request, particulars or application to which the Data Protection Act 1998 s 64 applies should be in writing is satisfied where the text of the notice, request, particulars or application: (1) is transmitted by electronic means; (2) is received in legible form; and (3) is capable of being used for subsequent reference: s 64(2). Section 64 applies to: (a) a notice or request under any provision of Pt II (ss 7-15) (as amended) (see para 524 et seq post); or (b) a notice under s 24(1) (see para 542 post) or particulars made available under that provision; or (c) an application under s 41(2) (see para 560 post), but does not apply to anything which is required to be served in accordance with rules of court: s 64(1). The Lord Chancellor may by regulations provide that any requirement that any notice, request, particulars or application to which s 64 applies should be in writing is not to apply in such circumstances as may be prescribed by the regulations: s 64(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt I para 6(1)(u)). At the date at which this volume states the law, no such regulations had been made.

9 See Schs 8, 14. The exemption of certain manual data from the Data Protection Act 1998 Act is effective only until 23 October 2007: see para 529 post.

10 See para 579 et seq post.

11 See the Health and Social Care Act 2001; and paras 577-578 post.

UPDATE

503 The legislation

NOTE 2--The Data Protection Directive is applicable to an internet operation whereby a person identified other persons by name or other details on an internet page: Case C-101/01 *Criminal proceedings against Lindqvist* [2004] QB 1014, ECJ.

NOTE 4--Now with effect from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(1) INTRODUCTION/504. Scope and application of the legislation.

504. Scope and application of the legislation.

Except as otherwise provided¹, the Data Protection Act 1998 applies to a data controller² in respect of any data³ only if: (1) the data controller is established in the United Kingdom and the data is processed in the context of that establishment⁴; or (2) the data controller is established neither in the United Kingdom nor in any other EEA state⁵ but uses equipment in the United Kingdom for processing the data otherwise than for the purposes of transit through the United Kingdom⁶.

The Data Protection Act 1998 binds the Crown⁷. Each government department⁸ must be treated as a person separate from any other government department⁹.

As from 30 November 2005¹⁰, and subject to the exemption for personal data covered by Parliamentary privilege¹¹, the Data Protection Act 1998 applies to the processing of personal data by or on behalf of either House of Parliament as it applies to the processing of personal data by other persons¹².

1 Ie by or under the Data Protection Act 1998 s 54: see para 520 post.

2 For the meaning of 'data controller' see para 506 note 7 post.

3 For the meaning of 'data' see para 506 post.

4 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 3.

For the meaning of 'processing' (of information or data) see para 506 note 1 post.

5 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; OJ L1, 3.1.94, p 3; Cm 2073) as adjusted by the Protocol (Brussels, 17 March 1993; OJ L1, 3.1.94, p 571; Cm 2183): Data Protection Act 1998 s 70(1). 'European Economic Area' is to be construed accordingly.

6 Ibid s 5(1). A data controller falling within head (2) in the text must nominate for the purposes of the Data Protection Act 1998 a representative established in the United Kingdom: s 5(2). For the purposes of s 5(1), (2), each of the following is to be treated as established in the United Kingdom:

- (1) an individual who is ordinarily resident in the United Kingdom;
- (2) a body incorporated under the law of, or of any part of, the United Kingdom;
- (3) a partnership or other unincorporated association formed under the law of any part of the United Kingdom; and

(4) any person who does not fall within head (1), head (2) or head (3) above but maintains in the United Kingdom (a) an office, branch or agency through which he carries on any activity; or (b) a regular practice,

and the reference to establishment in any other EEA state has a corresponding meaning: s 5(3).

7 Ibid s 63(1). Where the purposes for which and the manner in which any personal data is, or is to be, processed are determined by any person acting on behalf of the Royal Household, the Duchy of Lancaster or the Duchy of Cornwall, the data controller in respect of the data for the purposes of the Data Protection Act 1998 is: (1) in relation to the Royal Household, the Keeper of the Privy Purse; (2) in relation to the Duchy of Lancaster, such person as the Chancellor of the Duchy appoints; and (3) in relation to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints: s 63(3). For the meaning of 'personal data' see para 506 post. Different persons may be appointed under head (2) or head (3) supra for different purposes: s 63(4). Neither a government department nor a person who is a data controller by virtue of s 63(3) is liable to prosecution under the Data Protection Act 1998, but s 55 (see para 567 post) and Sch 9 para 12 (see para 575 post) apply to a person in the service of the Crown as they apply to any other person: s 63(5).

8 For the meaning of 'government department' see para 547 note 12 post.

9 Data Protection Act 1998 s 63(2).

10 Ibid s 63A is added by the Freedom of Information Act 2000 s 73, Sch 6 para 3 as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

11 See the Data Protection Act 1998 s 35A (as added); and para 555 post. As to Parliamentary privilege see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

12 Ibid s 63A(1) (as added: see note 10 supra). Where the purposes for which and the manner in which any personal data is, or is to be, processed are determined by or on behalf of the House of Commons, the data controller in respect of the data for the purposes of the Data Protection Act 1998 is the Corporate Officer of that House; and on behalf of the House of Lords, the data controller for those purposes is the Corporate Officer of that House: s 63A(2), (3) (as so added). Nothing in s 63A(2), (3) (as added) renders the Corporate Officer of the House of Commons or the Corporate Officer of the House of Lords liable to prosecution under the Data Protection Act 1998, but s 55 (see para 567 post) and Sch 9 para 12 (see para 575 post) apply to a person acting on behalf of either House as they apply to any other person: s 63A(4) (as so added).

UPDATE

504 Scope and application of the legislation

NOTE 7--The Data Protection Act 1998 s 54A (see PARA 520) also applies to a person in the service of the Crown as it applies to any other persons: s 63(5) (amended by the Crime (International Co-operation) Act 2003 Sch 5 para 71).

TEXT AND NOTE 10--Now as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(1) INTRODUCTION/505. Orders, regulations and rules.

505. Orders, regulations and rules.

Any power conferred by the Data Protection Act 1998 on the Lord Chancellor to make an order, regulations or rules is exercisable by statutory instrument¹. Any order, regulations or rules made may make different provision for different cases, and may make such supplemental, incidental, consequential or transitional provision or savings as the Lord Chancellor considers appropriate².

1 See the Data Protection Act 1998 s 67(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt I para 6(1)(v)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

2 See the Data Protection Act 1998 s 67(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(v)).

UPDATE

505 Orders, regulations and rules

TEXT AND NOTES--Data Protection Act 1998 s 67 further amended: Criminal Justice and Immigration Act 2008 s 144(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(1) INTRODUCTION/506. Meaning of 'data' and related expressions.

506. Meaning of 'data' and related expressions.

In the Data Protection Act 1998, unless the context otherwise requires, 'data' means information which: (1) is being processed¹ by means of equipment operating automatically in response to instructions given for that purpose; or (2) is recorded with the intention that it should be processed by means of such equipment; or (3) is recorded as part of a relevant filing system² or with the intention that it should form part of a relevant filing system; or (4) does not fall within head (1), (2) or (3) above but forms part of an accessible record³. As from 30 November 2005⁴, this definition is extended to include information which is recorded information held by a public authority⁵ and which does not fall within any of heads (1) to (4) above⁶.

'Personal data' means data which relates to a living individual who can be identified: (a) from the data; or (b) from the data and other information which is in the possession of, or is likely to come into the possession of, the data controller⁷, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual⁸. 'Data processor', in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller⁹. 'Data subject' means an individual who is the subject of personal data¹⁰. In the Data Protection Act 1998, unless the context otherwise requires: (i) 'obtaining' or 'recording', in relation to personal data, includes obtaining or recording the information to be contained in the data; and (ii) 'using' or 'disclosing', in relation to personal data, includes using or disclosing the information contained in the data¹¹.

In the Data Protection Act 1998, 'sensitive personal data' means personal data consisting of information as to: (A) the racial or ethnic origin of the data subject; (B) his political opinions; (C) his religious beliefs or other beliefs of a similar nature; (D) whether he is a member of a trade union¹²; (E) his physical or mental health or condition; (F) his sexual life; (G) the commission or alleged commission by him of any offence; or (H) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings, or the sentence of any court in such proceedings¹³.

1 'Processing', in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including: (1) organisation, adaptation or alteration of the information or data; (2) retrieval, consultation or use of the information or data; (3) disclosure of the information or data by transmission, dissemination or otherwise making it available; or (4) alignment, combination, blocking, erasure or destruction of the information or data: Data Protection Act 1998 s 1(1). The hard copy publication of data previously subject to automatic data processing forms part of the processing and thus falls within the scope of the Data Protection Act 1998: *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224.

2 'Relevant filing system' means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible: Data Protection Act 1998 s 1(1).

3 Ibid s 1(1). 'Accessible record' means: (1) a health record; (2) an educational record; or (3) an accessible public record: s 68(1). 'Health record' means any record which: (a) consists of information relating to the physical or mental health or condition of an individual; and (b) has been made by or on behalf of a health professional in connection with the care of that individual: s 68(2). For the meaning of 'health professional' see s 69 (as amended); and para 450 ante. As to the meaning of 'educational record' see Sch 11; and as to the meaning of 'accessible public record' see Sch 12.

In determining for the purposes of the Data Protection Act 1998 whether any information is recorded with the intention: (i) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose; or (ii) that it should form part of a relevant filing system, it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area: s 1(3). For the meaning of 'European Economic Area' see para 504 note 5 ante.

4 Ibid s 1(1) is amended by the Freedom of Information Act 2000 ss 68, 86, Sch 8 Pt II, so as to extend this definition as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

5 'Public authority' has the same meaning as in the Freedom of Information Act 2000 (see para 583 note 2 post): see the Data Protection Act 1998 s 1(1) (definition added by the Freedom of Information Act 2000 s 68(1), (2)(b) as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (as amended: see note 4 supra)).

For these purposes, information is held by a public authority if it is held by the authority otherwise than on behalf of another person, or it is held by another person on behalf of the authority: Freedom of Information Act 2000 s 3(2); applied by the Data Protection Act 1998 s 1(5) (added by the Freedom of Information Act 2000 s 68(1), (3) as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (as amended: see note 4 supra)). Where the Freedom of Information Act 2000 s 7 (see para 583 note 2 post) prevents Pts I-V (ss 1-61) from applying to certain information held by a public authority, that information is not to be treated for these purposes as 'held' by a public authority: Data Protection Act 1998 s 1(6) (added by the Freedom of Information Act 2000 s 68(1), (2)(b) as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (as amended: see note 4 supra)).

6 Data Protection Act 1998 s 1(1) (as amended: see note 4 supra). The information made available under this provision is not limited to personal data, nor is it required to be held in electronic form or in a 'structured' manual system but access rights to this information are limited in other ways: see para 532 et seq post.

7 'Data controller' means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data is, or is to be, processed: ibid s 1(1). Where personal data is processed only for purposes for which it is required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of the Data Protection Act 1998 the data controller: s 1(4). 'Enactment' includes an enactment passed after the Data Protection Act 1998 (ie passed after 16 July 1998): s 70(1).

The Lord Chancellor may by order: (1) make provision under which a data controller may appoint a person to act as a data protection supervisor responsible in particular for monitoring in an independent manner the data controller's compliance with the provisions of the Data Protection Act 1998; and (2) provide that, in relation to any data controller who has appointed a data protection supervisor in accordance with the provisions of the order and who complies with such conditions as may be specified in the order, the provisions of Pt III (ss 16-26) (as amended) are to have effect subject to such exemptions or other modifications as may be specified in the order: s 23(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(k)). Such an order may: (a) impose duties on data protection supervisors in relation to the Information Commissioner; and (b) confer functions on the Commissioner in relation to data protection supervisors: Data Protection Act 1998 s 23(2). At the date at which this volume states the law, no such order has been made. As

to the Commissioner see para 518 post. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

8 Ibid s 1(1).

9 Ibid s 1(1).

10 Ibid s 1(1)

11 Ibid s 1(2).

12 Ie within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992: see EMPLOYMENT vol 40 (2009) PARA 846.

13 Data Protection Act 1998 s 2.

UPDATE

506 Meaning of 'data' and related expressions

NOTE 1--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

NOTE 3--As to the release of 'barnadised' data see *Common Services Agency v Scottish Information Comr (Scotland)* [2008] UKHL 47, [2008] 1 WLR 1550, [2008] All ER (D) 120 (Jul).

TEXT AND NOTES 4, 5--References to 30 November 2005 are now to 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/507. The data protection principles.

(2) THE DATA PROTECTION PRINCIPLES

507. The data protection principles.

The Data Protection Act 1998 sets out eight principles by which all personal data¹ must be processed². Special conditions apply for the purposes of the first data protection principle³. The eighth data protection principle does not apply in certain cases⁴.

It is the duty of a data controller⁵ to comply with the data protection principles in relation to all personal data with respect to which he is the data controller⁶.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 The principles are set out in the Data Protection Act 1998 Sch 1 Pt I and all references in the Act to the 'data protection principles' are to these principles: s 4(1). They must be interpreted in accordance with Sch 1 Pt II: s 4(2). For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 Ie the conditions set out in *ibid* Sch 2, which applies to all personal data (see para 509 post), and in Sch 3, which applies only to sensitive personal data (see para 510 post): see s 4(3).

4 Ie the cases set out in *ibid* Sch 4 (see para 517 text and notes 11-19 post): see s 4(3).

5 For the meaning of 'data controller' see para 506 note 7 ante.

6 Data Protection Act 1998 s 4(4). This provision is subject to s 27(1) (see para 545 post): s 4(4).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/508. The first data protection principle.

508. The first data protection principle.

The first data protection principle is that personal data¹ must be processed² fairly³ and lawfully⁴ and, in particular, must not be processed unless: (1) at least one of the specified conditions which apply to all personal data⁵ is met⁶; and (2) in the case of sensitive personal data⁷, at least one of the specified conditions which apply only to sensitive personal data⁸ is also met⁹.

In determining for the purposes of the first data protection principle whether personal data is processed fairly, regard is to be had to the method by which the data is obtained¹⁰, including in particular whether any person from whom it is obtained is deceived or misled as to the purpose or purposes for which it is to be processed¹¹. Data is to be treated as obtained fairly if it consists of information obtained from a person who is authorised by or under any enactment¹² to supply it, or is required to supply it by or under any enactment or by any Convention or other instrument imposing an international obligation on the United Kingdom¹³.

Personal data is not to be treated as processed fairly unless: (a) in the case of data obtained from the data subject¹⁴, the data controller¹⁵ ensures so far as practicable that the data subject has, is provided with, or has made readily available to him¹⁶: (i) the identity of the data controller¹⁷; (ii) if he has nominated a representative for the purposes of the Data Protection Act 1998, the identity of that representative¹⁸; (iii) the purpose or purposes for which the data is intended to be processed¹⁹; and (iv) any further information which is necessary, having regard to the specific circumstances in which the data is or is to be processed, to enable processing in respect of the data subject to be fair²⁰; and (b) in any other case, the data controller ensures so far as practicable that, before the relevant time²¹ or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in heads (i) to (iv) above²².

Personal data which contains a general identifier falling within a description prescribed by the Lord Chancellor by order are not to be treated as processed fairly and lawfully unless it is processed in compliance with any conditions so prescribed in relation to general identifiers of that description²³.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 See *British Gas Trading Ltd v Data Protection Registrar* [1998] Info TLR 393, Data Protection Tribunal (under the Data Protection Act 1984, if the processing took place for a reason to which the subject had not consented then it was unfair; it was held that new customers must be given the chance to opt out of such processing and existing customers must have the right to object). See also the text and notes 14-22 infra.

4 Data acquired in breach of the law of confidence would be processed unlawfully. See para 480 et seq ante.

5 ie one of the conditions specified in the Data Protection Act 1998 Sch 2 (see para 509 post).

6 Ibid Sch 1 Pt I para 1(a).

7 For the meaning of 'sensitive personal data' see para 506 ante.

8 ie one of the conditions in the Data Protection Act 1998 Sch 3 (see para 510 post).

9 Ibid Sch 1 Pt I para 1(b).

10 For the meaning of 'obtaining' (of personal data) see para 506 ante.

11 Data Protection Act 1998 Sch 1 Pt II para 1(1). For the meaning of 'United Kingdom' see para 504 note 4 ante.

12 For the meaning of 'enactment' see para 506 note 7 ante.

13 Data Protection Act 1998 Sch 1 Pt II para 1(2).

14 For the meaning of 'data subject' see para 506 ante.

15 For the meaning of 'data controller' see para 506 note 7 ante.

16 Data Protection Act 1998 Sch 1 Pt II para 2(1)(a).

17 Ibid Sch 1 Pt II para 2(3)(a).

18 Ibid Sch 1 Pt II para 2(3)(b).

19 Ibid Sch 1 Pt II para 2(3)(c).

20 Ibid Sch 1 Pt II para 2(3)(d).

21 For these purposes, 'the relevant time' means: (1) the time when the data controller first processes the data; or (2) in a case where at that time disclosure to a third party within a reasonable period is envisaged: (a) if the data is in fact disclosed to such a person within that period, the time when the data is first disclosed; (b) if within that period the data controller becomes, or ought to become, aware that the data is unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware; or (c) in any other case, the end of that period: *ibid* Sch 1 Pt II para 2(2).

22 *Ibid* Sch 1 Pt II para 2(1)(b). This does not apply where either of the following conditions, together with such further conditions as may be prescribed, are met: (1) the provision of that information would involve a disproportionate effort; or (2) the recording of the information to be contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract: see Sch 1 Pt II para 3(1), (2)(a), (b) (Sch 1 Pt II para 3(1) amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt I para 6(1)(x)). Further conditions have been prescribed by the Data Protection (Conditions under Paragraph 3 of Part II of Schedule 1) Order 2000, SI 2000/185. One of the following conditions must be met if the Data Protection Act 1998 Sch 1 Pt II para 2(1)(b) is to be disapplied in respect of any particular data subject: (a) no notice in writing has been received at any time by the data controller from an individual, requiring that data controller to provide the information set out in Sch 1 Pt II para 2(3) (see heads (i)-(iv) in the text) before the relevant time or as soon as practicable after that time; or (b) where such notice in writing has been received but the data controller does not have sufficient information about the individual in order readily to determine whether he is processing personal data about that individual, the data controller must send to the individual a written notice stating that he cannot provide the information set out in Sch 1 Pt II para 2(3) (see heads (i)-(iv) in the text) because of his inability to make that determination, and explaining the reasons for that inability: see the Data Protection (Conditions under Paragraph 3 of Part II of Schedule 1) Order 2000, SI 2000/185, arts 3, 4. In cases where the condition set out in head (1) supra is met, the following condition must be met if the Data Protection Act 1998 Sch 1 Pt II para 2(1)(b) is to be disapplied in respect of any data: the data controller must record the reasons for his view that the condition set out in head (1) supra is met in respect of the data: see the Data Protection (Conditions under Paragraph 3 of Part II of Schedule 1) Order 2000, SI 2000/185, arts 3, 5.

23 Data Protection Act 1998 Sch 1 Pt II para 4(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(x)). 'A general identifier' means any identifier (eg a number or code used for identification purposes) which relates to an individual, and forms part of a set of similar identifiers which is of general application: Data Protection Act 1998 Sch 1 Pt II para 4(2). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/509. The first data protection principle; conditions to be met in relation to all personal data.

509. The first data protection principle; conditions to be met in relation to all personal data.

For the purposes of the first data protection principle¹, the conditions which apply to the processing² of all personal data³ are as follows:

- (1) the data subject⁴ must have given his consent to the processing⁵;
- (2) the processing must be necessary either for the performance of a contract to which the data subject is a party, or for the taking of steps at the request of the data subject with a view to entering into a contract⁶;
- (3) the processing must be necessary for compliance with any legal obligation to which the data controller⁷ is subject, other than an obligation imposed by contract⁸;
- (4) the processing must be necessary in order to protect the vital interests of the data subject⁹;
- (5) the processing must be necessary:
 - 1. (a) for the administration of justice¹⁰; or
 - 2. (b) for the exercise of any functions of either House of Parliament¹¹; or
 - 3. (c) for the exercise of any functions conferred on any person by or under any enactment¹²; or
 - 4. (d) for the exercise of any functions of the Crown, a Minister of the Crown or a government department¹³; or
 - 5. (e) for the exercise of any other functions of a public nature exercised in the public interest by any person¹⁴;
- (6) the processing must be necessary for the purposes of legitimate interests pursued by the data controller or by the third party¹⁵ or parties to whom the data is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject¹⁶.

1 As to the first data protection principle see para 508 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 Ie the conditions referred to in para 508 head (1) ante. For the meanings of 'personal data' and 'data' see para 506 ante.

4 For the meaning of 'data subject' see para 506 ante.

5 Data Protection Act 1998 s 4(3), Sch 2 para 1.

6 Ibid Sch 2 para 2.

7 For the meaning of 'data controller' see para 506 note 7 ante.

8 Data Protection Act 1998 Sch 2 para 3.

9 Ibid Sch 2 para 4.

10 Ibid Sch 2 para 5(a).

11 Ibid Sch 2 para 5(aa) (added by the Freedom of Information Act 2000 s 73, Sch 6 para 4 as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))).

12 Data Protection Act 1998 Sch 2 para 5(b).

13 Ibid Sch 2 para 5(c). 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 363): Data Protection Act 1998 s 70(1).

14 Ibid Sch 2 para 5(d).

15 For the meaning of 'third party' see para 531 note 5 post.

16 Data Protection Act 1998 Sch 2 para 6(1). The Lord Chancellor may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied: Sch 2 para 6(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(y)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

UPDATE

509 The first data protection principle; conditions to be met in relation to all personal data

NOTE 11--Now as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/510. The first data protection principle; conditions to be met in relation to sensitive personal data.

510. The first data protection principle; conditions to be met in relation to sensitive personal data.

For the purposes of the first data protection principle¹, the conditions which apply to the processing² of sensitive personal data are as follows³:

- (1) the data subject⁴ must have given his explicit consent to the processing of the personal data⁵;
- (2) the processing must be necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment⁶;
- (3) the processing must be necessary: (a) in order to protect the vital interests of the data subject or another person, either in a case where consent cannot be given by or on behalf of the data subject or where the data controller⁷ cannot reasonably be expected to obtain the consent of the data subject; or (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld⁸;
- (4) the processing: (a) must be carried out in the course of its legitimate activities by any body or association which is not established or conducted for profit, and exists for political, philosophical religious or trade-union purposes; (b) must be carried out with appropriate safeguards for the rights and freedoms of data subjects; (c) must relate only to individuals who are members of the body or association or who have regular contact with it in connection with its purposes; and

(d) must not involve disclosure of the personal data to a third party without the consent of the data subject⁹;

(5) the information contained in the personal data must have been made public as a result of steps deliberately taken by the data subject¹⁰;

(6) the processing must be necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), for the purpose of obtaining legal advice, or must be otherwise necessary for the purposes of establishing, exercising or defending legal rights¹¹;

(7) the processing must be necessary¹²: (a) for the administration of justice¹³; (b) for the exercise of any functions of either House of Parliament¹⁴; (c) for the exercise of any functions conferred on any person by or under an enactment¹⁵; or (d) for the exercise of any functions of the Crown, a Minister of the Crown or a government department¹⁶;

(8) the processing must be necessary for medical purposes¹⁷ and must be undertaken by a health professional¹⁸, or by a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional¹⁹;

(9) the processing must be: (a) of sensitive personal data consisting of information as to racial or ethnic origin; (b) necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained; and (c) carried out with appropriate safeguards for the rights and freedoms of data subjects²⁰; and

(10) the personal data must be processed in circumstances specified in an order made by the Lord Chancellor for these purposes²¹.

1 As to the first data protection principle see para 508 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 Ie the conditions referred to in para 508 head (2) ante. For the meanings of 'personal data', 'data' and 'sensitive personal data' see para 506 ante.

4 For the meaning of 'data subject' see para 506 ante.

5 Data Protection Act 1998 s 4(3), Sch 3 para 1.

6 Ibid Sch 3 para 2(1). The Lord Chancellor may by order: (1) exclude the application of this condition in such cases as may be specified; or (2) provide that, in such cases as may be specified, the condition is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied: Sch 3 para 2(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1) (z)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

7 For the meaning of 'data controller' see para 506 note 7 ante.

8 Data Protection Act 1998 Sch 3 para 3.

9 Ibid Sch 3 para 4.

10 Ibid Sch 3 para 5.

11 Ibid Sch 3 para 6.

12 Ibid Sch 3 para 7(1). The Lord Chancellor may by order: (1) exclude the application of this condition in such cases as may be specified; or (2) provide that, in such cases as may be specified, this condition is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied: Sch 3 para 7(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1) (z)). At the date at which this volume states the law, no such order had been made.

13 Data Protection Act 1998 Sch 3 para 7(1)(a).

14 Ibid Sch 2 para 7(1)(aa) (added by the Freedom of Information Act 2000 s 73, Sch 6 para 5 as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))).

15 Data Protection Act 1998 Sch 3 para 7(1)(b).

16 Ibid Sch 3 para 7(1)(c). For the meaning of 'Minister of the Crown' see para 509 note 13 ante.

17 For these purposes, 'medical purposes' includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services: *ibid* Sch 3 para 8(2).

18 For the meaning of 'health professional' see *ibid* s 69 (as amended); and para 450 ante.

19 Ibid Sch 3 para 8(1).

20 Ibid Sch 3 para 9(1). The Lord Chancellor may by order specify circumstances in which processing falling within head (9)(a) and head (9)(b) in the text is, or is not, to be taken for the purposes of head (9)(c) in the text to be carried out with appropriate safeguards for the rights and freedoms of data subjects: Sch 3 para 9(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(z)). At the date at which this volume states the law, no such order had been made.

21 Data Protection Act 1998 Sch 3 para 10 (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(z)).

The following circumstances have been specified by the Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417 (as amended):

(1) where the processing: (a) is in the substantial public interest; (b) is necessary for the purposes of the prevention or detection of any unlawful act (or failure to act); and (c) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice those purposes (Schedule para 1);

(2) where the processing: (a) is in the substantial public interest; (b) is necessary for the discharge of any function which is designed for protecting members of the public against (i) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person; or (ii) mismanagement in the administration of, or failures in services provided by, any body or association; and (c) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the discharge of that function (Schedule para 2);

(3) where the disclosure of personal data: (a) is in the substantial public interest; (b) is in connection with (i) the commission by any person of any unlawful act or failure to act (whether alleged or established); (ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established); or (iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established); (c) is for the special purposes as defined in the Data Protection Act 1998 s 3 (see para 519 note 4 post); and (d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest (Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417, Schedule para 3);

(4) where the processing: (a) is in the substantial public interest; (b) is necessary for the discharge of any function which is designed for the provision of confidential counselling, advice, support or any other service; and (c) is carried out without the explicit consent of the data subject because the processing (i) is necessary in a case where consent cannot be given by the data subject; (ii) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject; or (iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the provision of that counselling, advice, support or other service (Schedule para 4);

(5) where the processing: (a) is necessary for the purpose of: (i) carrying on insurance business; or (ii) making determinations in connection with eligibility for, and benefits payable under, an occupational pension scheme as defined in the Pension Schemes Act 1993 s 1 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 741); (b) is of sensitive personal data consisting of information relating to a person's physical or mental health or condition (see the

Data Protection Act 1998 s 2(e); and para 506 head (E) ante) and relating to a data subject who is the parent, grandparent, great grandparent or sibling of, in the case of head (5)(a)(i) supra, the insured person, or, in the case of head (5)(a)(ii) supra, the member of the scheme; (c) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of that data subject and the data controller is not aware of the data subject withholding his consent; and (d) does not support measures or decisions with respect to that data subject (Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417, Schedule para 5);

(6) where the processing: (a) is of sensitive personal data in relation to any particular data subject that is subject to processing which was already under way immediately before the coming into force of the Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417 (ie 1 March 2000); (b) is necessary for the purpose of: (i) effecting or carrying out contracts of long term insurance to which head (5) supra also applies; or (ii) establishing or administering an occupational pension scheme as defined in the Pension Schemes Act 1993 s 1 (see SOCIAL SECURITY AND PENSIONS VOL 44(2) (Reissue) para 741); and (c) either (i) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject and that data subject has not informed the data controller that he does not so consent; or (ii) must necessarily be carried out even without the explicit consent of the data subject so as not to prejudice those purposes (Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417, Schedule para 6);

(7) where the processing: (a) is of sensitive personal data consisting of information falling within the Data Protection Act 1998 s 2(c), (E) (see para 506 heads (c), (E) ante); (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons holding different beliefs or of different states of physical or mental health or different physical or mental conditions as described in the Act, with a view to enabling such equality to be promoted or maintained; (c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and (d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person. Where any individual has given notice in writing to any data controller who is processing personal data under these provisions requiring that data controller to cease processing personal data in respect of which that individual is the data subject at the end of such period as is reasonable in the circumstances, that data controller must have ceased processing those personal data at the end of that period (Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417, Schedule para 7);

(8) where the processing: (a) is of sensitive personal data consisting of information falling within the Data Protection Act 1998 s 2(b) (see para 506 head (B) ante); (b) is carried out by any person or organisation included in the register maintained pursuant to the Registration of Political Parties Act 1998 s 1 (repealed: as to the registration of political parties see CONSTITUTIONAL LAW AND HUMAN RIGHTS) in the course of his or its legitimate political activities; and (c) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person. Where any individual has given notice in writing to any data controller who is processing personal data under these provisions requiring that data controller to cease processing personal data in respect of which that individual is the data subject at the end of such period as is reasonable in the circumstances, that data controller must have ceased processing those personal data at the end of that period (Data Protection (Processing of Sensitive Personal Data) Order 2000, SI 2000/417, Schedule para 8);

(9) where the processing: (a) is in the substantial public interest; (b) is necessary for research purposes; (c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and (d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person (Schedule para 9);

(10) where the processing is necessary for the exercise of any functions conferred on a constable by any rule of law (Schedule para 10).

See also the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002, SI 2002/2905.

UPDATE

510 The first data protection principle; conditions to be met in relation to sensitive personal data

TEXT AND NOTES--See also 1998 Act Sch 3 para 7A (added by Serious Crime Act 2007 s 72) which allows the processing of sensitive personal data through an anti-fraud organisation.

NOTE 14--Now as from 1 January 2005: SI 2004/3122.

NOTE 21--See further the Data Protection (Processing of Sensitive Personal Data) Order 2006, SI 2006/2068 and the Data Protection (Processing of Sensitive Personal Data) Order 2009, SI 2009/1811, specifying the following circumstances: (1) the processing of information about certain criminal convictions relating to indecent photographs or pseudo-photographs of children, which is necessary for the purpose of administering (or cancelling) an account relating to the payment card used in the commission of the offence; and (2) the processing of information about a prisoner, including information relating to the prisoner's release from prison, for the purpose of informing a Member of Parliament about the prisoner and arrangements for the prisoner's release.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/511. The second data protection principle.

511. The second data protection principle.

The second data protection principle is that personal data¹ must be obtained² only for one or more specified and lawful purposes³, and must not be further processed⁴ in any manner incompatible with that purpose or those purposes⁵.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'obtaining' (of personal data) see para 506 ante.

3 The purpose or purposes for which personal data are obtained may in particular be specified: (1) in a notice as given for the purposes of the Data Protection Act 1998 Sch 1 Pt II para 2 (see para 508 text to notes 16-22 ante) by the data controller to the data subject; or (2) in a notification given to the Information Commissioner under Pt III (ss 16-26) (as amended) (see para 538 post): s 4(2), Sch 1 Pt II para 5. As to the Commissioner see para 518 post.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 Data Protection Act 1998 Sch 1 Pt I para 2. In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data was obtained, regard is to be had to the purpose or purposes for which the personal data is intended to be processed by any person to whom it is disclosed: Sch 1 Pt II para 6.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/512. The third data protection principle.

512. The third data protection principle.

The third data protection principle is that personal data¹ must be adequate, relevant and not excessive in relation to the purpose or purposes for which it is processed².

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 Data Protection Act 1998 s 4(1), Sch 1 Pt I para 3. For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

UPDATE

512 The third data protection principle

NOTE 2--See *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079, [2010] 1 WLR 1136, [2009] All ER (D) 180 (Oct).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/513. The fourth data protection principle.

513. The fourth data protection principle.

The fourth data protection principle is that personal data¹ must be accurate² and, where necessary, kept up to date³.

This principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately records information obtained by the data controller⁴ from the data subject or a third party⁵ in a case where: (1) having regard to the purpose or purposes for which the data was obtained⁶ and further processed, the data controller has taken reasonable steps to ensure the accuracy of the data; and (2) if the data subject⁷ has notified the data controller of the data subject's view that the data is inaccurate, the data indicates that fact⁸.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the purposes of the Data Protection Act 1998, data is inaccurate if it is incorrect or misleading as to any matter of fact: s 70(2).

3 Ibid s 4(1), Sch 1 Pt I para 4.

4 For the meaning of 'data controller' see para 506 note 7 ante.

5 For the meaning of 'third party' see para 531 note 5 post.

6 For the meaning of 'obtaining' (of personal data) see para 506 ante.

7 For the meaning of 'data subject' see para 506 ante.

8 Data Protection Act 1998 Sch 1 Pt II para 7.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/514. The fifth data protection principle.

514. The fifth data protection principle.

The fifth data protection principle is that personal data¹ processed² for any purpose or purposes must not be kept for longer than is necessary for that purpose or those purposes³.

- 1 For the meanings of 'personal data' and 'data' see para 506 ante.
- 2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 3 Data Protection Act 1998 s 4(1), Sch 1 Pt I para 5.

UPDATE

514 The fifth data protection principle

NOTE 2--See *Chief Constable of Humberside Police v Information Commissioner* [2009] EWCA Civ 1079, [2010] 1 WLR 1136, [2009] All ER (D) 180 (Oct).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/515. The sixth data protection principle.

515. The sixth data protection principle.

The sixth data protection principle is that personal data¹ must be processed² in accordance with the rights of data subjects³ under the Data Protection Act 1998⁴.

- 1 For the meanings of 'personal data' and 'data' see para 506 ante.
- 2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 3 For the meaning of 'data subject' see para 506 ante.
- 4 Data Protection Act 1998 s 4(1), Sch 1 Pt I para 6. A person is to be regarded as contravening this principle if, but only if: (1) he contravenes the provisions of s 7 (as amended) (see paras 524-525 post) by failing to supply information in accordance with those provisions; or (2) he contravenes s 10 (see para 526 post) by failing to comply with a notice given under s 10(1) to the extent that the notice is justified or by failing to give a notice under 10(3); or (3) he contravenes s 11 (see para 527 post) by failing to comply with a notice given under s 11(1); or (4) he contravenes s 12 (see para 528 post) by failing to comply with a notice given under s 12(1), (2)(b) or by failing to give a notification under s 12(2)(a) or a notice under s 12(3); or (5) he contravenes s 12A (as added) (see para 529 post) by failing to comply with a notice given under s 12A(1) (as added) to the extent that the notice is justified: Sch 1 Pt II para 8 (temporarily amended by s 72, Sch 13 para 5 until 23 October 2007).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/516. The seventh data protection principle.

516. The seventh data protection principle.

The seventh data protection principle is that appropriate technical and organisational measures must be taken against unauthorised or unlawful processing¹ of personal data² and against accidental loss or destruction of, or damage to, personal data³.

Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to: (1) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage; and (2) the nature of the data to be protected⁴. The data controller⁵ must take reasonable steps to ensure the reliability of any employees of his who have access to the personal data⁶. Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller must in order to comply with this principle: (a) choose a data processor providing sufficient guarantees in respect of the technical and organisational security measures governing the processing to be carried out; and (b) take reasonable steps to ensure compliance with those measures⁷. Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller is not to be regarded as complying with the seventh data protection principle unless: (i) the processing is carried out under a contract which is made or evidenced in writing, and under which the data processor is to act only on instructions from the data controller; and (ii) the contract requires the data processor to comply with obligations equivalent to those imposed on a data controller by the seventh data protection principle⁸.

1 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 Data Protection Act 1998 s 4(1), Sch 1 Pt I para 7.

4 The unauthorised or unlawful processing or accidental loss, destruction or damage are as mentioned in the seventh data protection principle (see notes 1-3 supra): ibid Sch 1 Pt II para 9.

5 For the meaning of 'data controller' see para 506 note 7 ante.

6 Data Protection Act 1998 Sch 1 Pt II para 10.

7 Ibid Sch 1 Pt II para 11.

8 Ibid Sch 1 Pt II para 12

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(2) THE DATA PROTECTION PRINCIPLES/517. The eighth data protection principle.

517. The eighth data protection principle.

The eighth data protection principle is that personal data¹ must not be transferred to a country or territory outside the European Economic Area² unless that country or territory ensures an

adequate level of protection for the rights and freedoms of data subjects³ in relation to the processing⁴ of personal data⁵.

An adequate level of protection is one which is adequate in all the circumstances of the case, having regard in particular to:

- (1) the nature of the personal data;
- (2) the country or territory of origin of the information contained in the data;
- (3) the country or territory of final destination of that information;
- (4) the purposes for which and period during which the data is intended to be processed;
- (5) the law in force in the country or territory in question;
- (6) the international obligations of that country or territory;
- (7) any relevant codes of conduct or other rules which are enforceable in that country or territory (whether generally or by arrangement in particular cases); and
- (8) any security measures taken in respect of the data in that country or territory⁶.

Where: (a) in any proceedings under the Data Protection Act 1998 any question arises as to whether the requirement of the eighth data protection principle as to an adequate level of protection is met in relation to the transfer of any personal data to a country or territory outside the European Economic Area; and (b) a Community finding⁷ has been made in relation to transfers of the kind in question, that question is to be determined in accordance with that finding⁸.

Except in such circumstances and to such extent as the Lord Chancellor may by order provide⁹, the eighth data protection principle does not apply to a transfer falling within any of the following cases¹⁰:

- (i) where the data subject has given his consent to the transfer¹¹;
- (ii) where the transfer is necessary for the performance of a contract between the data subject and the data controller, or for the taking of steps at the request of the data subject with a view to his entering into a contract with the data controller¹²;
- (iii) where the transfer is necessary for the conclusion, or the performance, of a contract between the data controller and a person other than the data subject which is entered into at the request of the data subject, or is in the interests of the data subject¹³;
- (iv) where the transfer is necessary for reasons of substantial public interest¹⁴;
- (v) where the transfer is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or is necessary for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights¹⁵;
- (vi) where the transfer is necessary in order to protect the vital interests of the data subject¹⁶;
- (vii) where the transfer is of part of the personal data on a public register and any conditions subject to which the register is open to inspection are complied with by any person to whom the data is or may be disclosed after the transfer¹⁷;
- (viii) where the transfer is made on terms which are of a kind approved by the Information Commissioner as ensuring adequate safeguards for the rights and freedoms of data subjects¹⁸; and
- (ix) where the transfer has been authorised by the Commissioner as being made in such a manner as to ensure adequate safeguards for the rights and freedoms of data subjects¹⁹.

- 1 For the meanings of 'personal data' and 'data' see para 506 ante.
- 2 For the meaning of 'European Economic Area' see para 504 note 5 ante.
- 3 For the meaning of 'data subject' see para 506 ante.
- 4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 5 Data Protection Act 1998 s 4(1), Sch 1 Pt I para 8.
- 6 Ibid Sch 1 Pt II para 13.
- 7 'Community finding' means a finding of the European Commission, under the procedure provided for in EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art 31(2), that a country or territory outside the European Economic Area does, or does not, ensure an adequate level of protection within the meaning of art 25(2): Data Protection Act 1998 Sch 1 Pt II para 15(2). As to the adequacy of the safe harbour privacy principles for the protection of personal data transferred from a member state of the European Union to the United States see EC Commission Decision 2000/520 of 26 July 2000 (OJ L215, 25.8.2000, p 7).
- 8 Data Protection Act 1998 Sch 1 Pt II para 15(1).
- 9 Ibid Sch 1 Pt II para 14 (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt I para 6(1)(x)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.
- 10 Data Protection Act 1998 Sch 1 Pt II para 14 (as amended: see note 9 supra).
- 11 Ibid s 4(3), Sch 4 para 1.
- 12 Ibid Sch 4 para 2.
- 13 Ibid Sch 4 para 3.
- 14 Ibid Sch 4 para 4(1). For these purposes, the Lord Chancellor may by order specify: (1) circumstances in which a transfer is to be taken to be necessary for reasons of substantial public interest; and (2) circumstances in which a transfer which is not required by or under an enactment is not to be taken to be necessary for reasons of substantial public interest: Sch 4 para 4(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(aa)). At the date at which this volume states the law, no such order had been made.

The provision under the Immigration and Asylum Act 1999 s 13 of identification data is a transfer of personal data that is necessary for reasons of substantial public interest within the meaning of the Data Protection Act 1998 Sch 4 para 4(1): see the Immigration and Asylum Act 1999 s 13(4), (5); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 152.

- 15 Data Protection Act 1998 Sch 4 para 5.
- 16 Ibid Sch 4 para 6.
- 17 Ibid Sch 4 para 7.
- 18 Ibid Sch 4 para 8. As to the Commissioner see para 518 post.
- 19 Ibid Sch 4 para 9.

UPDATE

517 The eighth data protection principle

NOTES 14, 15--See *Re Madoff Securities International Ltd* [2009] EWHC 442 (Ch), [2009] All ER (D) 31 (Mar) (investigation into complex fraud).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(i) The Information Commissioner/518. The Information Commissioner.

(3) THE INFORMATION COMMISSIONER AND TRIBUNAL

(i) The Information Commissioner

518. The Information Commissioner.

For the purposes of the Data Protection Act 1998 and of the Freedom of Information Act 2000 there is an officer known as the Information Commissioner¹, who is appointed by Her Majesty by Letters Patent². Further provision is made in relation to the status and capacity of the Commissioner, his tenure of office, salary, officers and staff and for money and accounts³.

It is the duty of the Information Commissioner to promote the following of good practice⁴ by data controllers⁵ and, in particular, so to perform his functions under the Data Protection Act 1998 as to promote the observance of the requirements of the Act by data controllers⁶. The Commissioner must arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public about the operation of the Act, about good practice, and about other matters within the scope of his functions under the Act, and may give advice to any person as to any of those matters⁷. Where: (1) the Lord Chancellor so directs by order; or (2) the Commissioner considers it appropriate to do so, the Commissioner must, after such consultation with trade associations⁸, data subjects or persons representing data subjects as appears to him to be appropriate, prepare and disseminate to such persons as he considers appropriate codes of practice for guidance as to good practice⁹. Where he considers it appropriate to do so, the Commissioner must encourage trade associations to prepare, and to disseminate to their members, such codes of practice; and where any trade association submits a code of practice to him for his consideration, he must consider the code and, after such consultation with data subjects or persons representing data subjects as appears to him to be appropriate, he must notify the trade association whether in his opinion the code promotes the following of good practice¹⁰. The Commissioner must arrange for the dissemination in such form and manner as he considers appropriate of: (a) any Community finding¹¹; (b) any decision of the European Commission¹²; and (c) such other information as it may appear to him to be expedient to give to data controllers in relation to any personal data about the protection of the rights and freedoms of data subjects in relation to the processing of personal data in countries and territories outside the European Economic Area¹³. The Commissioner may, with the consent of the data controller, assess any processing of personal data for the following of good practice and must inform the data controller of the results of the assessment¹⁴. The Commissioner may charge such sums as he may with the consent of the Lord Chancellor determine for any services provided by the Commissioner¹⁵.

The Commissioner must lay annually before each House of Parliament a general report on the exercise of his functions under the Data Protection Act 1998¹⁶. The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit¹⁷.

Further provision is made in relation to the status and capacity of the Commissioner, his tenure of office, salary, officers and staff and for money and accounts¹⁸.

¹ Data Protection Act 1998 s 6(1) (substituted by the Freedom of Information Act 2000 s 18(4), Sch 2 para 13). As to the functions of the Commissioner under the Freedom of Information Act 2000 see para 608 et seq post.

2 Data Protection Act 1998 s 6(2). The person who held office as Commissioner immediately before 30 November 2000 (ie the day on which the Freedom of Information Act 2000 was passed) had to vacate his office at the end of the period of two years beginning with that day (Freedom of Information Act 2000 s 18(5)) but this did not prevent his re-appointment (s 18(6)).

3 See the Data Protection Act 1998 s 6(7), Sch 5 (amended by the Freedom of Information Act 2000 Sch 2 paras 15, 20-22; and the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(bb)).

4 In the Data Protection Act 1998 s 51, 'good practice' means such practice in the processing of personal data as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, and includes (but is not limited to) compliance with the requirements of the Data Protection Act 1998: s 51(9). For the meanings of 'processing' (of information or data), 'personal data', 'data' and 'data subject' see para 506 ante.

5 For the meaning of 'data controller' see para 506 note 7 ante.

6 Data Protection Act 1998 s 51(1).

7 Ibid s 51(2).

8 In *ibid* s 51, 'trade association' includes any body representing data controllers: s 51(9).

9 *Ibid* s 51(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(q)). An order under the Data Protection Act 1998 s 51(3) (as amended) must describe the personal data or processing to which the code of practice is to relate, and may also describe the persons or classes of persons to whom it is to relate: s 51(5). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

In exercise of the power given under s 51(3) (as amended), the Commissioner has issued: (1) the CCTV code of practice (2000), which provides guidance as to good practice for users of CCTV (closed circuit television) and similar surveillance equipment; and (2) the Employment Practices Data Protection Code, of which Part 1: Recruitment and Selection (2002), Part 2: Employment Records (2002) and Part 3: Monitoring at Work (2003) had been issued at the date on which this volume states the law.

10 Data Protection Act 1998 s 51(4).

11 For the meaning of 'Community finding' see para 517 note 7 ante.

12 Ie under the procedure provided for in EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art 31(2), which is made for the purposes of art 26(3), (4).

13 Data Protection Act 1998 s 51(6). For the meaning of 'European Economic Area' see para 504 note 5 ante.

14 *Ibid* s 51(7).

15 *Ibid* s 51(8) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(q)). The services referred to in the text are those provided by virtue of the Data Protection Act 1998 Pt VI (ss 51-75) (as amended).

16 *Ibid* s 52(1).

17 *Ibid* s 52(2). The Commissioner must lay before each House of Parliament any code of practice prepared under s 51(3) (as amended) (see the text and notes 8-9 *supra*) for complying with a direction of the Lord Chancellor, unless the code is included in any report laid under s 52(1) (see the text and note 16 *supra*) or s 52(2): s 52(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(r)).

18 See the Data Protection Act 1998 s 6(7), Sch 5 (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 1(2)).

UPDATE

518 The Information Commissioner

TEXT AND NOTES--As to the power of the Information Commissioner to impose a monetary penalty on data controllers see Data Protection Act 1998 ss 55A-55E (added by Criminal Justice and Immigration Act 2008 s 144(1)).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(i) The Information Commissioner/519. Assistance in cases involving processing for the special purposes.

519. Assistance in cases involving processing for the special purposes.

An individual who is an actual or prospective party to any proceedings¹ which relate to personal data² processed³ for the special purposes⁴ may apply to the Information Commissioner⁵ for assistance in relation to those proceedings⁶. The Commissioner must, as soon as reasonably practicable after receiving such an application, consider it and decide whether and to what extent to grant it, but he must not grant the application unless, in his opinion, the case involves a matter of substantial public importance⁷. If the Commissioner decides to provide assistance, he must, as soon as reasonably practicable after making the decision, notify the applicant⁸, stating the extent of the assistance to be provided⁹. If the Commissioner decides not to provide assistance, he must, as soon as reasonably practicable after making the decision, notify the applicant of his decision and, if he thinks fit, the reasons for it¹⁰.

1 Le under the Data Protection Act 1998 s 7(9), s 10(4), s 12(8), s 12A(3) (as added) or s 14 or by virtue of s 13: s 53(1) (temporarily amended by s 72, Sch 13 para 4 until 23 October 2007). In s 53, references to 'proceedings' include references to prospective proceedings: s 53(5).

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

4 In the Data Protection Act 1998, 'the special purposes' means any one or more of the following: (1) the purposes of journalism; (2) artistic purposes; and (3) literary purposes: s 3.

5 As to the Commissioner see para 518 ante.

6 Data Protection Act 1998 s 53(1). As to the giving of assistance see further s 53(6), Sch 10.

7 Ibid s 53(2).

8 'Applicant', in relation to assistance under ibid s 53, means an individual who applies for assistance: s 53(5).

9 Ibid s 53(3).

10 Ibid s 53(4).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(i) The Information Commissioner/520. International co-operation.

520. International co-operation.

The Information Commissioner¹ is the designated authority in the United Kingdom for the purposes of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data². The Lord Chancellor³ may by order make provision as to the functions to be discharged by the Commissioner⁴.

The Commissioner⁵ must, at the request of a foreign designated authority⁶, furnish to that authority such information referred to in the Convention⁷, and in particular the data protection legislation in force in the United Kingdom at the time the request is made, as is the subject of the request⁸. He must also, at the request of a foreign designated authority, take appropriate measures⁹, for furnishing to that authority information relating to the processing¹⁰ of personal data¹¹ in the United Kingdom¹². Equally, the Commissioner may request a foreign designated authority to furnish to him or, as the case may be, to take appropriate measures for furnishing to him, information that is required under the Convention¹³.

Where a person resident outside the United Kingdom makes a request¹⁴ to the Commissioner, seeking assistance pursuant to the Convention¹⁵:

- (1) if the request seeks assistance in exercising rights under the Data Protection Act 1998¹⁶, and does not indicate that the data controller has failed to comply with the same request on a previous occasion¹⁷, the Commissioner must notify the requesting person¹⁸ of the address of the data controller¹⁹ for the receipt of notices from data subjects²⁰ exercising such rights and of such other information as the Commissioner considers necessary to enable that person to exercise such rights²¹;
- (2) if the request indicates that a data protection principle²² has been contravened by a data controller, the Commissioner must:
 - 6. (a) notify the requesting person of the rights of data subjects and the remedies available to them²³ together with such particulars as are contained in the data controller's entry in the register²⁴ as are necessary to enable the requesting person to avail himself of those remedies²⁵; or
 - 7. (b) if the Commissioner considers that notification in accordance with head (a) above would not assist the requesting person or would, for any other reason, be inappropriate, treat the request as if it were a request for an assessment²⁶.

The Commissioner is not required, in response to any request referred to in head (1) or head (2) above, to supply to the requesting person a duly certified copy in writing of the particulars contained in any entry made in the register other than on payment of such fee as is prescribed²⁷.

Where the Commissioner receives information from a foreign designated authority either as a result of a request made by him²⁸, or as a result of a request received by him²⁹, the Commissioner must use that information only for the purposes specified in the request³⁰.

Where a request for assistance in exercising any of the rights under the Convention³¹ in a country or territory (other than the United Kingdom) specified in the request is made by a person resident in the United Kingdom and submitted through the Commissioner³², the Commissioner must, if he is satisfied that the request contains all necessary particulars³³, send it to the foreign designated authority in the specified country or territory³⁴. If the Commissioner decides that he is not required by this provision to render assistance to the requesting person he must, where practicable, notify that person of the reasons for his decision³⁵.

The Commissioner³⁶ is also the supervisory authority in the United Kingdom for the purposes of the Data Protection Directive³⁷.

The Lord Chancellor may by order make provision as to co-operation by the Commissioner with the European Commission and with supervisory authorities in other EEA states³⁸ in connection with the performance of their respective duties³⁹ and, in particular, as to: (i) the exchange of information with supervisory authorities in other EEA states or with the European Commission⁴⁰; and (ii) the exercise within the United Kingdom at the request of a supervisory authority in another EEA state of functions of the Commissioner specified in the order⁴¹.

Under the order so made⁴², the Commissioner must inform the European Commission and the supervisory authorities⁴³, where he is satisfied that any transfer⁴⁴ or proposed transfer by a data controller has involved or would involve a contravention of the eighth principle⁴⁵, of the reasons why he is satisfied in this regard⁴⁶. This provision does not apply in cases where an enforcement notice has been served in respect of a contravention of the eighth principle, unless⁴⁷:

- (A) the period within which an appeal can be brought under the Data Protection Act 1998⁴⁸ has expired without an appeal being brought⁴⁹; or
- (B) (where an appeal has been brought⁵⁰) either the decision of the Information Tribunal⁵¹ is to the effect that there has been a breach of the eighth principle, or, where any decision of the Tribunal is to the effect that there has not been a breach of that eighth principle, the Commissioner has appealed successfully against that finding⁵².

Where a transfer has been authorised by another member state⁵³ in purported compliance with the Data Protection Directive⁵⁴, and the Commissioner is satisfied that such authorisation is not in compliance⁵⁵, the Commissioner may inform the European Commission of the particulars of the authorisation together with the reasons for his view that the authorisation is not so compliant⁵⁶.

Where a data controller is processing data⁵⁷ in the United Kingdom but the Data Protection Act 1998 does not apply⁵⁸, and the processing is within the scope of the functions of a supervisory authority in another EEA state⁵⁹, the Commissioner may, at the request of the authority, exercise his statutory functions⁶⁰ in relation to such processing as if the data controller were processing the data within the scope of the Data Protection Act 1998⁶¹. Where the Commissioner has received such a request from such a supervisory authority, he must, in any case where he so decides to exercise his statutory functions, send to the supervisory authority as soon as reasonably practicable after exercising those functions such statement of the extent of the action that he has taken as he thinks fit⁶²; and in any case where he decides not to exercise those functions, he must send to the supervisory authority as soon as reasonably practicable after making the decision the reasons for that decision⁶³.

Where a data controller is processing data in another EEA state in circumstances that would bring it within the scope of the Data Protection Act 1998 if the data controller or the data processing equipment were established in the United Kingdom⁶⁴, the Commissioner may request the supervisory authority of that EEA state to exercise the functions conferred on it by that EEA state pursuant to the Data Protection Directive⁶⁵ in relation to the processing in question⁶⁶. Any request so made must specify the name and address in the EEA state, in so far as they are known by the Commissioner, of the data controller⁶⁷, and such details of the circumstances of the case as the Commissioner thinks fit to enable the supervisory authority to exercise those functions⁶⁸.

The Commissioner may supply to the European Commission or any supervisory authority information to the extent to which, in the opinion of the Commissioner, the supply of that information is necessary for the performance of the data protection functions of the recipient⁶⁹.

The Commissioner also carries out any data protection functions⁷⁰ which the Lord Chancellor may by order direct him to carry out for the purpose of enabling Her Majesty's government in the United Kingdom to give effect to any international obligations of the United Kingdom⁷¹. The

Commissioner must, if so directed by the Lord Chancellor, provide any authority exercising data protection functions under the law of a colony specified in the direction with such assistance in connection with the discharge of those functions and on such terms (including terms as to payment) as the Lord Chancellor may direct or approve⁷².

1 As to the Commissioner see para 518 ante.

2 Data Protection Act 1998 s 54(1)(a). The purposes referred to in the text are those of the Convention art 13, which requires all parties to render each other mutual assistance in order to implement the Convention. For the purposes of the Data Protection Act 1998 s 54 (as amended), 'the Convention' means the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data which was opened for signature on 28 January 1981 (TS 86 (1990) Cm 1329): Data Protection Act 1998 s 54(8). For the meaning of 'United Kingdom' see para 504 note 4 ante.

3 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

4 Data Protection Act 1998 s 54(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt I para 6(1)(s)). As to the order that has been made see the Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186; and the text and notes 5-35 infra.

5 For the purposes of the Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, references to the Commissioner are references to the Commissioner as the designated authority in the United Kingdom for the purposes of the Convention art 13: Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 2(2).

6 For these purposes, a 'foreign designated authority' means an authority designated for the purposes of the Convention art 13 by a party (other than the United Kingdom) which is bound by that Convention: Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 2(1).

7 Ie the information referred to in the Convention art 13(3)(a).

8 Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 3(1).

9 Ie in accordance with the Convention art 13(3)(b).

10 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

11 For the meaning of 'personal data' see para 506 ante.

12 Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 3(2).

13 Ibid art 3(3). The information mentioned in the text is that referred to in the Convention art 13(3).

14 Other than where a request is made under the Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 3 (see notes 4-13 supra) a 'request' for these purposes means a request for assistance under the Convention art 14 which states: (1) the name and address of the person making the request; (2) particulars which identify the personal data to which the request relates; (3) the rights under the Convention art 8 to which the request relates; and (4) the reasons why the request has been made: Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 2(1). 'Requesting person' means a person making such a request: art 2(1).

15 Ie seeking assistance in exercising any of the rights under the Convention art 8: Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(1). This includes a request forwarded to the Commissioner through the Secretary of State or a foreign designated authority: art 4(1). As to the Secretary of State see para 521 note 2 post.

16 Ie under the Data Protection Act 1998 s 7 (as amended) (see paras 524-525 post): Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(2)(a).

17 Ie failed to comply contrary to the Data Protection Act 1998 s 7 (as amended) (see paras 524-525 post): Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(2)(b).

18 See note 14 supra.

19 For the meaning of 'data controller' see para 506 note 7 ante.

20 For the meaning of 'data subject' see para 506 ante.

21 Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(2).

22 As to the data protection principles see para 507 et seq ante.

23 Ie available under the Data Protection Act 1998 Pt II (ss 7-15) (as amended).

24 Ie the register maintained under *ibid* s 19(1) (see para 539 post): Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 2(1).

25 *Ibid* art 4(3)(a).

26 Ie treat it as a request for an assessment which falls to be dealt with under the Data Protection Act 1998 s 42 (see para 561 post): Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(3)(b).

27 Ie such fee as is prescribed for the purposes of the Data Protection Act 1998 s 19(7) (see para 539 post): Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 4(4).

28 Ie under *ibid* art 3(3) (see note 13 supra): art 6(a).

29 Ie under *ibid* art 3(2) (see the text and notes 9-12 supra) or art 4 (see the text and notes 14-27 supra): art 6(b).

30 *Ibid* art 6.

31 Ie the rights referred to in the Convention art 8.

32 Ie submitted under the Convention art 14(2).

33 Ie all the particulars referred to in the Convention art 14(3).

34 Data Protection (Functions of Designated Authority) Order 2000, SI 2000/186, art 5(1).

35 *Ibid* art 5(2).

36 Ie in his role as Commissioner, not as the designated authority in the United Kingdom for the purposes of the Convention art 13 (see note 5 supra).

37 Data Protection Act 1998 s 54(1)(b). The Directive referred to in the text is EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See para 503 ante.

38 For the meaning of 'EEA state' see para 504 note 5 ante.

39 Data Protection Act 1998 s 54(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(s)).

40 Data Protection Act 1998 s 54(3)(a).

41 This provision applies only to cases excluded by *ibid* s 5 from the application of the other provisions of the Data Protection Act 1998: s 54(3)(b).

42 Ie the Data Protection (International Co-operation) Order 2000, SI 2000/190.

43 For these purposes, 'supervisory authority' means a supervisory authority in an EEA state other than the United Kingdom for the purposes of EC Council Directive 95/46 (OJ L281, 23.11.95, p 31): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 2. As to the data protection principles see para 507 et seq ante.

44 For these purposes, 'transfer' means a transfer of personal data to a country or territory outside the European Economic Area: *ibid* art 2.

45 For this purpose, 'the eighth principle' means the eighth data protection principle set out in the Data Protection Act 1998 Sch 1 Pt I para 8, having regard to Sch 1 Pt II paras 13-15 (see para 517 ante): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 3(4).

46 Ibid art 3(1), (3).

47 Ibid art 3(2).

48 Ie an appeal brought under the Data Protection Act 1998 s 48(1): see para 568 post.

49 Data Protection (International Co-operation) Order 2000, SI 2000/190, art 3(2)(a).

50 Ie where an appeal has been brought under the Data Protection Act 1998 s 48(1): see para 568 post.

51 As to the Tribunal see para 521 post.

52 Data Protection (International Co-operation) Order 2000, SI 2000/190, art 3(2)(b).

53 Ie a member state of the European Union.

54 Ie in purported compliance with EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) art 26(2), which allows a member state to transfer personal data to a third country where the data controller adduces that adequate safeguards exist: Data Protection (International Co-operation) Order 2000, SI 2000/190, art 4(1)(a).

55 Ibid art 4(1)(b).

56 Ibid art 4(2).

57 For the meaning of 'data' see para 506 ante.

58 Ie where the processing takes place in circumstances other than those described in the Data Protection Act 1998 s 5(1) (see para 504 ante): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 5(1)(a).

59 Ibid art 5(1)(b).

60 Ie his functions under the Data Protection Act 1998 Pt V (ss 40-50) (see para 559 et seq post): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 5(2).

61 Ie in the circumstances described in the Data Protection Act 1998 s 5(1)(a) (see para 504 ante): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 5(2).

62 Ibid art 5(3)(a).

63 Ibid art 5(3)(b).

64 Ie if the data were being processed in the circumstances described in the Data Protection Act 1998 s 5(1) (see para 504 ante): Data Protection (International Co-operation) Order 2000, SI 2000/190, art 6(1).

65 Ie pursuant to EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) art 28(3).

66 Data Protection (International Co-operation) Order 2000, SI 2000/190, art 6(2).

67 Ibid art 6(3)(a).

68 Ibid art 6(3)(b).

69 Ibid art 7.

70 For these purposes, 'data protection functions' means functions relating to the protection of individuals with respect to the processing of personal information: Data Protection Act 1998 s 54(8).

71 Ibid s 54(4) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(s)).

72 Data Protection Act 1998 s 54(5) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(s)).

Where the European Commission makes a decision for the purposes of EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) art 26(3), (4) under the procedure provided for in art 31(2), the Commissioner must comply with that decision in exercising his functions under the Data Protection Act 1998 Sch 4 para 8 or Sch 4 para 9, as the case may be (see para 517 heads (viii) and (ix) ante): s 54(6). The Commissioner must inform the European

Commission and the supervisory authorities in other EEA states: (1) of any approvals granted for the purposes of Sch 4 para 8; and (2) of any authorisations granted for the purposes of Sch 4 para 9: s 54(7).

UPDATE

520 International co-operation

TEXT AND NOTES--The Information Commissioner may inspect any personal data recorded in (1) the Schengen information system, (2) the Europol information system, (3) the Customs information system: Data Protection Act 1998 s 54A(1) (added by the Crime (International Co-operation) Act 2003 s 81). In the Data Protection Act 1998 s 54A 'the Schengen information system' means the information system established under Title IV of the Convention implementing the Schengen Agreement of 14 June 1985, or any system established in its place in pursuance of any Community obligation, 'the Europol information system' means the information system established under Title II of the Convention on the Establishment of a European Police Office and 'the Customs information system' means the information system established under Chapter II of the Convention on the Use of Information Technology for Customs Purposes: Data Protection Act 1998 s 54A(7) (as so added). The power conferred by s 54A(1) is exercisable only for the purpose of assessing whether or not any processing of the data has been or is being carried out in compliance with the Data Protection Act 1998: s 54A(2) (as so added). The power includes power to inspect, operate and test equipment which is used for the processing of personal data: s 54A(3) (as so added). Before exercising the power, the Commissioner must give notice in writing of his intention to do so to the data controller: s 54A(4) (as so added). But s 54A(4) does not apply if the Commissioner considers that the case is one of urgency: s 54A(5) (as so added). Any person who (a) intentionally obstructs a person exercising the power conferred by s 54A(1), or (b) fails without reasonable excuse to give any person exercising the power any assistance he may reasonably require, is guilty of an offence: s 54A(6) (as so added).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(ii) The Information Tribunal/521. The Information Tribunal.

(ii) The Information Tribunal

521. The Information Tribunal.

For the purposes of the Data Protection Act 1998 and of the Freedom of Information Act 2000 there is a tribunal known as the Information Tribunal¹. The Tribunal consists of: (1) a chairman appointed by the Lord Chancellor after consultation with the Secretary of State²; (2) such number of deputy chairmen so appointed as the Lord Chancellor may determine³; and (3) such number of other members appointed by the Lord Chancellor as he may determine⁴.

¹ Data Protection Act 1998 s 6(3) (substituted by the Freedom of Information Act 2000 s 18(4), Sch 2 para 13). The Information Tribunal was formerly known as the Data Protection Tribunal, but its name was changed by the Freedom of Information Act 2000: see s 18(2). For the purposes of the Data Protection Act 1998, 'the Tribunal' means the Information Tribunal: s 70(1) (amended by the Freedom of Information Act 2000 Sch 2 para 14(b)). As to the establishment of the Tribunal see the Data Protection Act 1984 s 3(1)(b) (repealed). As to

tenure of office, salary, officers and staff, accounts etc of the Tribunal see the Data Protection Act 1998 s 6(7), Sch 5 Pt II.

2 Ibid s 6(4)(a) (amended by the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, SI 1999/678, art 2(1), Schedule). The members of the Tribunal appointed under heads (1) and (2) in the text must be: (1) persons who have a seven year general qualification, within the meaning of the Courts and Legal Services Act 1990 s 71 (see *LEGAL PROFESSIONS* vol 65 (2008) PARA 742); (2) advocates or solicitors in Scotland of at least seven years' standing; or (3) members of the bar of Northern Ireland or solicitors of the Supreme Court of Northern Ireland of at least seven years' standing: Data Protection Act 1998 s 6(5).

As to the Lord Chancellor see *CONSTITUTIONAL LAW AND HUMAN RIGHTS* vol 8(2) (Reissue) para 477 et seq. In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them: see *CONSTITUTIONAL LAW AND HUMAN RIGHTS* vol 8(2) (Reissue) para 355.

3 Data Protection Act 1998 s 6(4)(b). See note 2 supra.

4 Ibid s 6(4)(c) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt I para 6(1)(a)). The members of the Tribunal appointed under head (3) in the text must be: (1) persons to represent the interests of data subjects; (2) persons to represent the interests of those who make requests for information under the Freedom of Information Act 2000; (3) persons to represent the interests of data controllers; and (4) persons to represent the interests of public authorities: Data Protection Act 1998 s 6(6) (amended by the Freedom of Information Act 2000 Sch 2 para 16). For the meaning of 'data subject' see para 506 ante. For the meaning of 'data controller' see para 506 note 7 ante. For the meaning of 'public authority' see para 506 note 5 ante.

UPDATE

521 The Information Tribunal

TEXT AND NOTES 2-4--Any appointment to the office of chairman of the Information Tribunal or deputy chairman of the Information Tribunal in exercise of the function under the 1998 Act s 6(4) must be made, by virtue of the Constitutional Reform Act 2005 s 85, Sch 14 Pt 3, in accordance with ss 85-93, 96: see COURTS vol 10 (Reissue) PARA 515B.18.

The Lord Chancellor's functions under the 1998 Act s 6(4) are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and *CONSTITUTIONAL LAW AND HUMAN RIGHTS* vol 8(2) (Reissue) PARA 489A.1.

NOTE 2--1998 Act s 6(5) amended: Tribunals, Courts and Enforcement Act 2007 Sch 10 para 30.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(iii) Information provided to the Information Commissioner or Tribunal/522. Disclosure of information.

(iii) Information provided to the Information Commissioner or Tribunal

522. Disclosure of information.

No enactment¹ or rule of law prohibiting or restricting the disclosure of information precludes a person from furnishing the Information Commissioner² or the Information Tribunal³ with any

information necessary for the discharge of their functions under the Data Protection Act 1998 or the Freedom of Information Act 2000⁴.

- 1 For the meaning of 'enactment' see para 506 note 7 ante.
- 2 As to the Commissioner see para 518 ante.
- 3 As to the Tribunal see para 521 ante.
- 4 Data Protection Act 1998 s 58 (amended by the Freedom of Information Act 2000 s 18(4), Sch 2 Pt II para 18).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(3) THE INFORMATION COMMISSIONER AND TRIBUNAL/(iii) Information provided to the Information Commissioner or Tribunal/523. Confidentiality of information.

523. Confidentiality of information.

No person who is or has been the Information Commissioner¹, a member of the Commissioner's staff or an agent of the Commissioner may disclose any information which: (1) has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts²; and (2) relates to an identified or identifiable individual or business³; and (3) is not at the time of the disclosure, and has not previously been, available to the public from other sources, unless the disclosure is made with lawful authority⁴. For these purposes, a disclosure of information is made with lawful authority only if, and to the extent that:

- (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business; or
- (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of the information Acts; or
- (c) the disclosure is made for the purposes of, and is necessary for, the discharge of:

8. (i) any functions under the information Acts; or
9. (ii) any European Union obligation; or

- (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, the information Acts or otherwise; or
- (e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest⁵.

Any person who knowingly or recklessly discloses information in contravention of these provisions⁶ is guilty of an offence⁷.

- 1 As to the Commissioner see para 518 ante.

- 2 'The information Acts' means the Data Protection Act 1998 and the Freedom of Information Act 2000: Data Protection Act 1998 s 59(4) (added by the Freedom of Information Act 2000 s 18(4), Sch 2 Pt II para 19(1), (3)).

3 For the meaning of 'business' see para 538 note 5 post.

4 Data Protection Act 1998 s 59(1) (amended by the Freedom of Information Act 2000 Sch 2 para 19(1), (2)). This provision has effect in relation to the disclosure of information by or on behalf of a public authority as if the purposes for which the disclosure of the information is authorised included the purposes mentioned in the Anti-terrorism, Crime and Security Act 2001 s 17: see s 17, Sch 4 Pt 1 para 42; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 395.

5 Data Protection Act 1998 s 59(2) (amended by the Freedom of Information Act 2000 Sch 2 para 19(1), (2)). As to disclosures allowed by the law of confidence to protect legitimate interests see para 489 ante.

6 Ie in contravention of the Data Protection Act 1998 s 59(1) (see the text and notes 1-4 supra).

7 Ibid s 59(3).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/524. Rights of access to personal data.

(4) RIGHTS OF DATA SUBJECTS AND OTHERS

(i) In general

524. Rights of access to personal data.

An individual is entitled: (1) to be informed by any data controller¹ whether personal data² of which that individual is the data subject³ is being processed⁴ by or on behalf of that data controller; and (2) if that is the case, to be given by the data controller a description of: (a) personal data of which that individual is the data subject; (b) the purposes for which it is being or is to be processed; and (c) the recipients⁵ or classes of recipients to whom it is or may be disclosed; and (3) to have communicated to him in an intelligible form: (a) the information constituting any personal data of which that individual is the data subject⁶; and (b) any information available to the data controller as to the source of the data; and (4) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking⁷. The Lord Chancellor may by regulations provide that, in such cases as may be prescribed, a request for information under any one of these provisions is to be treated as extending also to information under any of the other provisions⁸.

The information to be supplied pursuant to a request⁹ must be supplied by reference to the data in question at the time when the request is received, except that it may take account of any amendment or deletion made between that time and the time when the information is supplied, being an amendment or deletion that would have been made regardless of the receipt of the request¹⁰.

Where a data controller has previously complied with a request made by an individual¹¹, the data controller is not obliged to comply with a subsequent identical or similar request by that individual unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request¹².

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 For the meaning of 'data subject' see para 506 ante.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 'Recipient', in relation to any personal data, means any person to whom the data is disclosed, including any person (such as an employee or agent of the data controller, a data processor or an employee or agent of a data processor) to whom it is disclosed in the course of processing the data for the data controller, but does not include any person to whom disclosure is or may be made as a result of, or with a view to, a particular inquiry by or on behalf of that person made in the exercise of any power conferred by law: Data Protection Act 1998 s 70(1). For the meanings of 'disclosing' (of personal data) and 'data processor' see para 506 ante.

6 The obligation imposed under head (3) in the text must be complied with by supplying the data subject with a copy of the information in permanent form unless the supply of such a copy is not possible or would involve disproportionate effort, or the data subject agrees otherwise: *ibid* s 8(2). Where any of the information referred to in this provision is expressed in terms which are not intelligible without explanation the copy must be accompanied by an explanation of those terms: s 8(2).

7 *Ibid* s 7(1). This provision is subject to s 7(2)-(11) (as amended) (see para 525 post), s 8 (as amended) (see the text and notes 8-12 *infra*), and s 9 (as amended) (see para 525 notes 12-18 post): s 7(1). As from 30 November 2005, it will also be subject to s 9A (as added) (see para 533 post): s 7(1) (prospectively amended by the Freedom of Information Act 2000 s 69(1)).

Head (4) in the text must not be regarded as requiring the provision of information as to the logic involved in any decision-taking if, and to the extent that, the information constitutes a trade secret: Data Protection Act 1998 s 8(5).

8 *Ibid* s 8(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(c)). As to the regulations that have been made see the Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000, SI 2000/191 (amended by SI 2001/3223). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

9 Ie under the Data Protection Act 1998 s 7 (as amended): see para 525 post.

10 *Ibid* s 8(6).

11 Ie under *ibid* s 7 (as amended): see para 525 post.

12 *Ibid* s 8(3).

UPDATE

524 Rights of access to personal data

NOTE 7--Now as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/525. Compliance with requests for information.

525. Compliance with requests for information.

A data controller is not obliged to supply any information¹ unless he has received a request in writing and, except in prescribed² cases, such fee (not exceeding the prescribed maximum³) as he may require⁴. Where a data controller reasonably requires further information in order to satisfy himself as to the identity of the person making a request⁵ and to locate the information which that person seeks, and has informed him of that requirement, the data controller is not obliged to comply with the request unless he is supplied with that further information⁶. Where a

data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless: (1) the other individual has consented to the disclosure of the information to the person making the request; or (2) it is reasonable in all the circumstances to comply with the request without the consent of the other individual⁷. An individual making a request may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description⁸. A data controller must comply with a request promptly and in any event before the end of the prescribed period⁹ beginning with the relevant day¹⁰. If a court is satisfied on the application of any person who has made a request under these provisions that the data controller in question has failed to comply with the request in contravention of these provisions, the court may order him to comply with the request¹¹.

Where the data controller is a credit reference agency¹², the provisions described above¹³ have effect subject to the following provisions¹⁴. An individual making a request¹⁵ may limit his request to personal data relevant to his financial standing, and is taken to have so limited his request unless the request shows a contrary intention¹⁶. Where the data controller receives a request in a case where personal data of which the individual making the request is the data subject are being processed by or on behalf of the data controller, the obligation to supply information includes an obligation to give the individual making the request a statement, in such form as may be prescribed by the Lord Chancellor by regulations, of the individual's rights (a) under the Consumer Credit Act 1974¹⁷; and (b) to the extent required by the prescribed form, under the Data Protection Act 1998¹⁸.

1 Ie under the Data Protection Act 1998 s 7(1): see para 524 ante. For the meaning of 'data controller' see para 506 note 7 ante.

2 For the purposes of *ibid* s 7 (as amended), 'prescribed' means prescribed by the Lord Chancellor by regulations: s 7(10) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(b)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

3 For the purposes of the Data Protection Act 1998 s 7 (as amended), 'the prescribed maximum' means such amount as may be prescribed: s 7(10). Different amounts may be prescribed in relation to different cases: s 7(11). As to the amount prescribed see the Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000, SI 2000/191 (amended by SI 2001/3223).

4 Data Protection Act 1998 s 7(2).

5 Ie under *ibid* s 7 (as amended).

6 *Ibid* s 7(3) (substituted by the Freedom of Information Act 2000 s 73, Sch 6 para 1). In determining whether requests under the Data Protection Act 1998 s 7 (as amended) are made at reasonable intervals, regard must be had to the nature of the data, the purpose for which the data is processed and the frequency with which the data is altered: s 8(4). For the meaning of 'data' see para 506 ante.

7 *Ibid* s 7(4). The reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and s 7(4) is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise: s 7(5). For the purposes of s 7(4), (5), another individual can be identified from the information being disclosed if he can be identified from that information, or from that and any other information which, in the reasonable belief of the data controller, is likely to be in, or to come into, the possession of the data subject making the request: s 8(7). In determining for the purposes of head (2) in the text whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard must be had, in particular, to: (1) any duty of confidentiality owed to the other individual; (2) any steps taken by the data controller with a view to seeking the consent of the other individual; (3) whether the other individual is capable of giving consent; and (4) any express refusal of consent by the other individual: s 7(6). For the meaning of 'data subject' see para 506 ante.

8 *Ibid* s 7(7). For the meaning of 'personal data' see para 506 ante. See the Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000, SI 2000/191 (as amended: see note 3 supra).

9 In the Data Protection Act 1998 s 7 (as amended), 'the prescribed period' means 40 days or such other period as may be prescribed: s 7(10). Different periods may be prescribed in relation to different cases: s 7(11). As to the period prescribed see the Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000, SI 2000/191 (as amended: see note 3 supra).

10 Data Protection Act 1998 s 7(8). This provision is subject to s 7(4) (see the text and note 7 supra). 'The relevant day', in relation to a request under s 7 (as amended), means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in s 7(3) (as substituted) (see the text and note 6 supra): s 7(10).

11 Ibid s 7(9). For the purpose of determining any question whether an applicant under s 7(9) is entitled to the information which he seeks (including any question whether any relevant data is exempt from s 7 (as amended) by virtue of Pt IV (ss 27-39) (as amended) (see para 545 et seq post), a court may require the information constituting any data processed by or on behalf of the data controller and any information as to the logic involved in any decision-taking as mentioned in s 7(1)(d) (see para 524 head (4) ante) to be made available for its own inspection but must not, pending the determination of that question in the applicant's favour, require the information sought by the applicant to be disclosed to him or his representatives: see s 15(2). The jurisdiction conferred by Pt II (ss 7-14) (as amended) is exercisable by the High Court or a county court: s 15(1).

12 'Credit reference agency' has the same meaning as in the Consumer Credit Act 1974 (see CONSUMER CREDIT vol 9(1) (Reissue) para 274): Data Protection Act 1998 s 70(1).

13 Ie ibid s 7 (as amended): see the text and notes 1-11 supra; and para 524 ante.

14 Ibid s 9(1).

15 Ie under ibid s 7 (as amended): see the text and notes 1-11 supra; and para 524 ante.

16 Ibid s 9(2).

17 Ie under the Consumer Credit Act 1974 s 159: see para 477 ante; and CONSUMER CREDIT vol 9(1) (Reissue) para 286.

18 Data Protection Act 1998 s 9(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(d)). See the Consumer Credit (Credit Reference Agency) Regulations 2000, SI 2000/290.

UPDATE

525 Compliance with requests for information

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 11--A person may apply for disclosure under the CPR notwithstanding that he has made an unsuccessful application under the 1998 Act s 7(9): *Johnson v Medical Defence Union Ltd* [2004] EWHC 2509 (Ch), [2005] 1 WLR 750.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/526. Right to prevent processing likely to cause damage or distress.

526. Right to prevent processing likely to cause damage or distress.

An individual is entitled at any time by notice in writing to a data controller¹ to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing², or processing for a specified purpose or in a specified manner, any personal data³ in respect of which he is the data subject⁴, on the ground that, for specified reasons: (1) the processing of the data or the processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another; and (2) that damage or distress is or would be unwarranted⁵. The data controller must within 21 days of receiving a notice⁶ ('the data subject notice') give the individual who gave it a written notice: (a) stating that he has complied or intends to comply with the data subject notice; or (b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it⁷. If a court is satisfied, on the application of any person who has given a notice which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit⁸.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For the meanings of 'personal data' and 'data' see para 506 ante.

4 For the meaning of 'data subject' see para 506 ante.

5 Data Protection Act 1998 s 10(1). Section 10(1) does not apply: (1) in a case where any of the conditions in Sch 2 paras 1-4 (see para 509 ante) is met; or (2) in such other cases as may be prescribed by the Lord Chancellor by order: s 10(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(f)).

The failure by a data subject to exercise the right conferred by the Data Protection Act 1998 s 10(1) does not affect any other right conferred on him by Pt II (ss 7-15) (as amended): s 10(5).

6 Ie under *ibid* s 10(1) (see the text and note 5 supra).

7 *Ibid* s 10(3).

8 *Ibid* s 10(4).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/527. Right to prevent processing for purposes of direct marketing.

527. Right to prevent processing for purposes of direct marketing.

An individual is entitled at any time by notice in writing to a data controller¹ to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing² for the purposes of direct marketing³ personal data⁴ in respect of which he is the data subject⁵. If the court is satisfied, on the application of any person who has given a notice⁶, that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit⁷.

These provisions do not apply in relation to the processing of telecommunications billing data for certain marketing purposes⁸.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For these purposes, 'direct marketing' means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals: Data Protection Act 1998 s 11(3).

4 For the meanings of 'personal data' and 'data' see para 506 ante.

5 Data Protection Act 1998 s 11(1). For the meaning of 'data subject' see para 506 ante. The failure by a data subject to exercise the right conferred by s 11(1) does not affect any other right conferred on him by Pt II (ss 7-15) (as amended): s 10(5). See *R (on the application of Robertson) v Wakefield MDC* [2001] EWHC 915 (Admin), [2002] QB 1052, [2002] LGR 286 (under the Data Protection Act 1984, the sale of copies of the electoral register for marketing purposes without right of objection breached the elector's right to privacy under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8, and to free elections under the First Protocol art 3).

6 Ie under the Data Protection Act 1998 s 11(1) (see the text and notes 1-5 supra).

7 Ibid s 11(2).

8 Ibid s 11(2A) (added by the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, reg 3(3), Sch 1 Pt II para 3). As to data protection issues related to the processing of telecommunications billing data see para 581 post.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/528. Rights in relation to automated decision-making.

528. Rights in relation to automated decision-making.

An individual is entitled at any time, by notice in writing to any data controller¹, to require the data controller to ensure that no decision taken by or on behalf of the data controller which significantly affects that individual is based solely on the processing² by automatic means of personal data³ in respect of which that individual is the data subject⁴ for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct⁵. Where, in a case where no notice⁶ has effect, a decision which significantly affects an individual is based solely on such processing as is mentioned above: (1) the data controller must as soon as reasonably practicable notify the individual that the decision was taken on that basis; and (2) the individual is entitled, within 21 days of receiving that notification from the data controller, by notice in writing to require the data controller to reconsider the decision or to take a new decision otherwise than on that basis⁷. The data controller must, within 21 days of receiving a notice under head (2) above ('the data subject notice') give the individual a written notice specifying the steps that he intends to take to comply with the data subject notice⁸. If a court is satisfied on the application of a data subject that a person taking a decision in respect of him ('the responsible person') has failed to comply with the provisions described above⁹, the court may order the responsible person to reconsider the decision, or to take a new decision which is not based solely on such processing as is mentioned above¹⁰.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For the meanings of 'personal data' and 'data' see para 506 ante.

4 For the meaning of 'data subject' see para 506 ante.

5 Data Protection Act 1998 s 12(1). See further note 7 infra.

6 Ie under *ibid* s 12(1) (see the text and notes 1-5 supra).

7 *Ibid* s 12(2). A notice under s 12(1) (see the text and notes 1-5 supra) does not have effect in relation to an exempt decision; and nothing in s 12(2) applies to an exempt decision: s 12(4). 'Exempt decision' means any decision: (1) in respect of which the conditions in s 12(6) and s 12(7) are met; or (2) which is made in such other circumstances as may be prescribed by the Lord Chancellor by order: s 12(5) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(g)). The condition in the Data Protection Act 1998 s 12(6) is that the decision: (a) is taken in the course of steps taken (i) for the purpose of considering whether to enter into a contract with the data subject; (ii) with a view to entering into such a contract; or (iii) in the course of performing such a contract; or (b) is authorised or required by or under any enactment: s 12(6). For the meaning of 'enactment' see para 506 note 7 ante. The condition in s 12(7) is that either: (A) the effect of the decision is to grant a request of the data subject; or (B) steps have been taken to safeguard the legitimate interests of the data subject (eg by allowing him to make representations): s 12(7).

8 *Ibid* s 12(3).

9 Ie *ibid* s 12(1) (see the text and notes 1-5 supra) or s 12(2)(b) (see head (2) in the text).

10 *Ibid* s 12(8). The processing referred to in the text is that mentioned in s 12(1) (see the text and notes 1-5 supra). An order under s 12(8) does not affect the rights of any person other than the data subject and the responsible person: s 12(9).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/529. Rights in relation to exempt manual data.

529. Rights in relation to exempt manual data.

The following provisions have effect until 23 October 2007¹.

A data subject² is entitled at any time by notice in writing: (1) to require the data controller³ to rectify, block, erase or destroy exempt manual data⁴ which are inaccurate⁵ or incomplete; or (2) to require the data controller to cease holding exempt manual data in a way incompatible with the legitimate purposes pursued by the data controller⁶. A notice under head (1) or head (2) above must state the data subject's reasons for believing that the data is inaccurate or incomplete or, as the case may be, his reasons for believing that it is held in a way incompatible with the legitimate purposes pursued by the data controller⁷. If the court is satisfied, on the application of any person who has given a notice⁸ which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit⁹.

For these purposes, personal data¹⁰ is incomplete if, and only if, the data, although not inaccurate, is such that its incompleteness would constitute a contravention of the third or fourth data protection principles¹¹, if those principles applied to the data¹².

1 The Data Protection Act 1998 s 12A is added with temporary effect for the period ending with 23 October 2007: see s 72, Sch 13 para 1.

2 For the meaning of 'data subject' see para 506 ante.

3 For the meaning of 'data controller' see para 506 note 7 ante.

4 For these purposes, 'exempt manual data' means:

- (1) in relation to the first transitional period:
 - 1. (a) eligible manual data forming part of an accessible record (Data Protection Act 1998 Sch 8 para 3(1)(a); applied by s 12A(4) (as added: see note 1 supra)); and
 - 2. (b) personal data which falls within the definition of data in s 1(1)(d) (see para 506 head (4) ante) but which, because it is not subject to processing which was already under way immediately before 24 October 1998, was not eligible data for the purposes of the transition provisions in Sch 8 (Sch 8 para 3(1)(b); applied by s 12A(4) (as so added)); or
 - 3. (c) eligible manual data which consists of information relevant to the financial standing of the data subject and in respect of which the data controller is a credit reference agency (Sch 8 para 4; applied by s 12A(4) (as so added)); and
- (2) in relation to the second transitional period:
 - 4. (a) eligible manual data which was held immediately before 24 October 1998 (Sch 8 para 14(1); applied by s 12A(4) (as added: see note 1 supra)); and
 - 5. (b) personal data which falls within the definition of data in s 1(1)(d) (see para 506 head (4) ante) but does not fall within head (2)(a) supra (Sch 8 para 14(1); applied by s 12A(4) (as so added)); but not
 - 6. (c) data which is eligible manual data processed only for the purpose of historical research in compliance with the relevant conditions (see s 33; and para 551 note 5 post) and is exempt from the provisions specified in Sch 8 para 16(2) after 23 October 2001 (Sch 8 para 16(1); applied by s 12A(4) (as so added)).

For these purposes, personal data is 'eligible data' at any time if, and to the extent that, it is at that time subject to processing which was already under way immediately before 24 October 1998: Sch 8 para 1(1). 'Eligible automated data' is eligible data which falls within the definition of data in s 1(1)(a), (b) (see para 506 heads (1) and (2) ante); and 'eligible manual data' means eligible data which is not eligible automated data: Sch 8 para 1(2). For the meaning of 'data' see para 506 ante. 'The first transitional period' means the period beginning with 1 March 2000 (ie the date of commencement of Sch 8) and ending with 23 October 2001; and 'the second transitional period' means the period beginning with 24 October 2001 and ending with 23 October 2007: Sch 8 para 1(2); applied by s 12A(4) (as so added). As to the principles and provisions from which data is exempt see Sch 8 paras 3(2), 4(2), 14(2).

5 For the purposes of the Data Protection Act 1998, data is inaccurate if it is incorrect or misleading as to any matter of fact: s 70(2).

- 6 Ibid s 12A(1) (as added: see note 1 supra).
- 7 Ibid s 12A(2) (as added: see note 1 supra).
- 8 Ie under ibid s 12A(1) (as added): see the text and note 6 supra.
- 9 Ibid s 12A(3) (as added: see note 1 supra).
- 10 For the meaning of 'personal data' see para 506 ante.
- 11 As to the data protection principles see para 507 et seq ante.
- 12 Data Protection Act 1998 s 12A(5) (as added: see note 1 supra).

530. Compensation for failure to comply with certain requirements.

An individual who suffers damage by reason of any contravention by a data controller¹ of any of the requirements of the Data Protection Act 1998 is entitled to compensation from the data controller for that damage². An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of the Data Protection Act 1998 is entitled to compensation from the data controller for that distress if: (1) the individual also suffers damage by reason of the contravention; or (2) the contravention relates to the processing³ of personal data⁴ for the special purposes⁵. In proceedings brought against a person by virtue of these provisions, it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned⁶.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 Data Protection Act 1998 s 13(1). Because the obligations imposed by data protection legislation may often coincide or converge with obligations of confidence, a claim for compensation under s 13 may be made in the alternative with a claim for damages to compensate a breach of the obligation of confidence (as to which see para 496 ante).

3 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

4 For the meanings of 'personal data' and 'data' see para 506 ante.

5 Data Protection Act 1998 s 13(2). For the meaning of the 'special purposes' see para 519 note 4 ante.

6 Ibid s 13(3). See *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003]

1 All ER 224 (where a newspaper is defending a claim for compensation under the Data Protection Act 1998 s 13, it may rely upon the exemption under s 32 (see para 550 post) where a journalist has reasonably believed that publication would be in the public interest). As to defences allowed to journalists who publish information in breach of obligations of confidence see para 475 ante.

UPDATE

530 Compensation for failure to comply with certain requirements

NOTE 3--As to the fairness of the processing of personal data see *Johnson v Medical Defence Union Ltd* [2007] EWCA Civ 262, (2007) 96 BMLR 99.

NOTE 6--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(i) In general/531. Rectification, blocking, erasure and destruction.

531. Rectification, blocking, erasure and destruction.

If a court is satisfied on the application of a data subject¹ that personal data² of which the applicant is the subject is inaccurate³, the court may order the data controller⁴ to rectify, block, erase or destroy the data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on the inaccurate data⁵. Where the court makes such an order, or is satisfied on the application of a data subject that personal data of which he was the data subject and which has been

rectified, blocked, erased or destroyed was inaccurate, it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data has been disclosed⁶ of the rectification, blocking, erasure or destruction⁷. If a court is satisfied on the application of a data subject: (1) that he has suffered damage by reason of any contravention by a data controller of any of the requirements of the Data Protection Act 1998 in respect of any personal data, in circumstances entitling him to compensation⁸; and (2) that there is a substantial risk of further contravention in respect of the data in such circumstances, the court may order the rectification, blocking, erasure or destruction of any of the data⁹.

1 For the meaning of 'data subject' see para 506 ante.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 For the meaning of 'inaccurate' (in relation to data) see para 513 note 2 ante.

4 For the meaning of 'data controller' see para 506 note 7 ante.

5 Data Protection Act 1998 s 14(1). Section 14(1) applies whether or not the data accurately records information received or obtained by the data controller from the data subject or a third party but where the data accurately records such information, then: (1) if the requirements mentioned in Sch 1 Pt II para 7 (see para 513 ante) have been complied with, the court may, instead of making an order under s 14(1), make an order requiring the data to be supplemented by such statement of the true facts relating to the matters dealt with by the data as the court may approve; and (2) if all or any of those requirements have not been complied with, the court may, instead of making an order under s 14(1), make such order as it thinks fit for securing compliance with those requirements with or without a further order requiring the data to be supplemented by such a statement as is mentioned in head (1) supra: s 14(2). 'Third party', in relation to personal data, means any person other than: (a) the data subject; (b) the data controller; or (c) any data processor or other person authorised to process data for the data controller or processor: s 70(1). For the meaning of 'data processor' see para 506 ante.

6 For the meaning of 'disclosing' (of personal data) see para 506 ante.

7 Data Protection Act 1998 s 14(3). See further s 14(6); and note 9 infra.

8 Ie under *ibid* s 13 (see para 530 ante).

9 *Ibid* s 14(4). Where the court makes an order under s 14(4) it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data has been disclosed of the rectification, blocking, erasure or destruction: s 14(5). In determining whether it is reasonably practicable to require such notification as is mentioned in s 14(3) (see the text and note 7 supra) or s 14(5), the court must have regard, in particular, to the number of persons who would have to be notified: s 14(6).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(ii) Statutory Right of Access to Personal Information held by Public Authorities/532. The right of access to personal information held by public authorities.

(ii) Statutory Right of Access to Personal Information held by Public Authorities

532. The right of access to personal information held by public authorities.

As from 30 November 2005, the Data Protection Act 1998¹ is amended to extend subject access to a potentially wide class of data held by public authorities² but in a way which is delimited by exemptions and qualifications. The regime operates according to the following principles:

- (1) certain data that is otherwise exempt under the Data Protection Act 1998 is brought within the scope of the Act when it is held by public authorities but only in relation to subject access and accuracy³; and
- (2) 'structured' information held by public authorities is treated as 'personal data' for the purposes of the Data Protection Act 1998⁴, but access to the residual 'unstructured'⁵ information is qualified⁶; and
- (3) a request for personal information about the applicant under the Freedom of Information Act 2000 is treated as a subject access request under the Data Protection Act 1998⁷ instead⁸.

1 The Data Protection Act 1998 is prospectively amended by the Freedom of Information Act 2000 as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

2 For the meaning of 'public authority' see para 506 note 5 ante.

3 See the Data Protection Act 1998 s 1 (prospectively amended by the Freedom of Information Act 2000 s 68: see note 1 supra); and paras 506 ante, 552 post. As to subject access and accuracy see paras 513, 524 ante.

4 For the meaning of 'personal data' see para 506 ante.

5 For the meaning of 'unstructured personal data' see para 533 note 4 post.

6 See the Data Protection Act 1998 s 9A (prospectively added by the Freedom of Information Act 2000 s 69: see note 1 supra); and para 533 post.

7 As to subject access requests see para 524 ante.

8 See the Freedom of Information Act 2000 s 40 (not yet in force); and para 534 post. The Data Protection Act 1998 becomes the route for subject access requests in relation to personal data of which the applicant is the subject by making such data exempt from the public authorities' duty of disclosure under the Freedom of Information Act 2000. Requests for information under the Freedom of Information Act 2000 which concern third parties are subject to the data protection principles: see s 40 (not yet in force); and para 534 post.

UPDATE

532-534 Statutory Right of Access to Personal Information held by Public Authorities

These provisions now in force as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(ii) Statutory Right of Access to Personal Information held by Public Authorities/533. Right of access to unstructured personal data held by public authorities.

533. Right of access to unstructured personal data held by public authorities.

As from 30 November 2005, the Data Protection Act 1998 is amended¹ so as to provide that a public authority² is not obliged to comply with a subject access request³ in relation to any unstructured personal data⁴ unless the request contains a description of the data⁵.

Even if the data is described by the data subject in his request, a public authority is not obliged to comply with such a request in relation to unstructured personal data if the authority

estimates that the cost of complying with the request so far as relating to the data would exceed the appropriate limit⁶.

Any estimate for the purposes of these provisions must be made in accordance with regulations made under the Freedom of Information Act 2000⁷.

1 The Data Protection Act 1998 s 9A is added by the Freedom of Information Act 2000 s 69(2), and is in force in so far as it confers powers to make regulations (see the Freedom of Information Act 2000 s 87(1)(m); and note 6 *infra*) and will enter into force for remaining purposes on 30 November 2005 unless an earlier date is appointed (see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))).

2 For the meaning of 'public authority' see para 506 note 5 ante.

3 Ie a request made under the Data Protection Act 1998 s 7(1): see para 524 ante.

4 For these purposes, 'unstructured personal data' means any personal data which falls within the extended definition of 'data' in para 506 ante, other than information which is recorded as part of, or with the intention that it should form part of, any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals: *ibid* s 9A(1) (as added: see note 1 *supra*).

5 *Ibid* s 9A(2) (as added: see note 1 *supra*).

6 *Ibid* s 9A(3) (as added: see note 1 *supra*). This provision does not exempt the public authority from its obligation to comply with s 7(1)(a) (see para 524 head (1) ante) in relation to the unstructured personal data unless the estimated cost of complying with s 7(1)(a) alone in relation to the data would exceed the appropriate limit: s 9A(4) (as so added). For these purposes, 'the appropriate limit' means such amount as may be prescribed by the Lord Chancellor by regulations, and different amounts may be prescribed in relation to different cases: s 9A(5) (as so added; and amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(e)). At the date at which this volume states the law, no such regulations had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

7 Ie regulations made under the Freedom of Information Act 2000 s 12(5) (see para 584 note 19 post): Data Protection Act 1998 s 9A(6) (as added: see note 1 *supra*).

UPDATE

532-534 Statutory Right of Access to Personal Information held by Public Authorities

These provisions now in force as from 1 January 2005: SI 2004/3122.

533 Right of access to unstructured personal data held by public authorities

NOTE 6--The appropriate limit for the purposes of the Data Protection Act 1998 s 9A(3), (4) is (1) £600 for public authorities listed in the Freedom of Information Act 2000 Sch 1 Pt 1 (paras 1-6); and (2) £450 for other public authorities: Freedom of Information (Appropriate Limit and Fees) Regulations 2004, SI 2004/3244, reg 3.

534. Compliance with requests for personal information held by public authorities.

The Freedom of Information Act 2000 provides that, as from 30 November 2005¹, any information to which a request for information under the Act relates² is exempt information if it constitutes personal data³ of which the applicant is the data subject⁴. Information is also exempt information for these purposes if: (1) it constitutes personal data of which the applicant is not the data subject⁵; and (2) either of the two conditions below is satisfied⁶.

The first condition is: (a) in a case where the information falls within the relevant parts of the definition of 'data' given in the Data Protection Act 1998⁷, that the disclosure of the information to a member of the public otherwise than under the Freedom of Information Act 2000 would contravene: (i) any of the data protection principles; or (ii) the right to prevent processing likely to cause damage or distress⁸; and (b) in any other case, that the disclosure of the information to a member of the public otherwise than under the Freedom of Information Act 2000 would contravene any of the data protection principles if the exemptions in the Data Protection Act 1998 which relate to manual data held by public authorities⁹ were disregarded¹⁰.

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998¹¹ the information is exempt from the data subject's right of access to personal data¹².

1 The Freedom of Information Act 2000 is to enter into force on 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

In determining for the purposes of these provisions whether anything done before 24 October 2007 would contravene any of the data protection principles, the exemptions in the Data Protection Act 1998 Sch 8 Pt III are to be disregarded: Freedom of Information Act 2000 s 40(6) (not yet in force). For these purposes, 'the data protection principles' means the principles set out in the Data Protection Act 1998 Sch 1 Pt I, as read subject to s 27(1) and Sch 1 Pt II (see para 507 et seq ante): see the Freedom of Information Act 2000 s 40(7) (not yet in force). The exemptions in the Data Protection Act 1998 Sch 8 Pt III are available after 23 October 2001 but before 24 October 2007 and apply to the data described in para 529 note 4 head (2) ante: Sch 8 para 14(1). During the period beginning with 24 October 2001 and ending with 23 October 2007, such data is exempt from: (1) the first data protection principle except to the extent to which it requires compliance with Sch 1 Pt II para 2 (see para 508 ante); (2) the second, third, fourth and fifth data protection principles (see paras 511-514 ante); and (3) the provisions of s 14(1)-(3) (see para 531 ante): see Sch 8 paras 1(2), 14(2).

2 Ie a request made under the Freedom of Information Act 2000 s 8: see para 524 ante.

3 For these purposes, 'personal data' has the same meaning as in the Data Protection Act 1998 s 1(1) (see para 506 ante): see the Freedom of Information Act 2000 s 40(7) (not yet in force).

4 Ibid s 40(1) (not yet in force). The 'duty to confirm or deny' does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this provision, and does not arise in relation to other information if or to the extent that either: (1) the giving to a member of the public of the confirmation or denial that would have to be given to comply with s 1(1)(a) would (apart from the Act) contravene any of the data protection principles or the Data Protection Act 1998 s 10 (see para 526 ante) or would do so if the exemptions in s 33A(1) (as added) (see para 552 post) were disregarded; or (2) by virtue of any provision of Pt IV (ss 27-39) (as amended) (see paras 545-557 post) the information is exempt from s 7(1) (a) (ie the data subject's right to be informed whether personal data is being processed: see para 524 ante): Freedom of Information Act 2000 s 40(5) (not yet in force). Under the Freedom of Information Act 2000, the duty of a public authority to inform in writing any person making a request for information to a public authority whether it holds information of the description specified in the request is referred to as 'the duty to confirm or deny': s 1(6). See also para 583 note 4 post. 'Data subject' has the same meaning as in the Data Protection Act 1998 s 1(1) (see para 506 ante): see the Freedom of Information Act 2000 s 40(7) (not yet in force).

5 Ibid s 40(2)(a) (not yet in force).

6 Ibid s 40(2)(b) (not yet in force).

7 Ie any of paragraphs in the Data Protection Act 1998 s 1(1)(a)-(d): see para 506 heads (1)-(4) ante. For the meaning of 'data' see para 506 ante.

8 Freedom of Information Act 2000 s 40(3)(a) (not yet in force). As to the right to prevent processing likely to cause damage or distress see the Data Protection Act 1998 s 10; and para 526 ante.

9 Ie the exemptions contained in ibid s 33A(1) (as added): see para 552 post. For the meaning of 'public authority' see para 506 note 5 ante.

10 Freedom of Information Act 2000 s 40(3)(b) (not yet in force).

11 Ie the Data Protection Act 1998 Pt IV (ss 27-39) (as amended).

12 Freedom of Information Act 2000 s 40(4) (not yet in force). As to the right to access referred to in the text see the Data Protection Act 1998 s 7(1)(c); and para 524 head (3) ante.

UPDATE

532-534 Statutory Right of Access to Personal Information held by Public Authorities

These provisions now in force as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(iii) Records obtained under Data Subject's Right of Access/535. Prohibition of requirement as to production of certain records.

(iii) Records obtained under Data Subject's Right of Access

535. Prohibition of requirement as to production of certain records.

The Data Protection Act 1998 provides that, as from a day to be appointed¹, a person must not, in connection with: (1) the recruitment of another person as an employee²; (2) the continued employment of another person; or (3) any contract for the provision of services to him by another person, require that other person or a third party³ to supply him with a relevant record⁴ or to produce a relevant record to him⁵. A person concerned with the provision (whether or not for payment) of goods, facilities or services to the public or a section of the public must not, as a condition of providing or offering to provide any goods, facilities or services to another person, require that other person or a third party to supply him with a relevant record or to produce a relevant record to him⁶. These provisions do not apply to a person who shows: (a) that the imposition of the requirement was required or authorised by or under any enactment⁷, by any rule of law or by the order of a court; or (b) that in the particular circumstances the imposition of the requirement was justified as being in the public interest⁸.

1 The Data Protection Act 1998 s 56 has effect only to the extent that it confers power to make subordinate legislation: s 75(2). At the date at which this volume states the law, no day had been appointed for s 56 to enter into force for other purposes: see s 75(3), (4).

2 In ibid s 56, 'employee' means an individual who: (1) works under a contract of employment, as defined by the Employment Rights Act 1996 s 230(2) (see EMPLOYMENT vol 39 (2009) PARA 2); or (2) holds any office, whether or not he is entitled to remuneration: Data Protection Act 1998 s 56(10) (not yet in force). 'Employment' must be construed accordingly: see s 56(10) (not yet in force).

3 For the meaning of 'third party' see para 531 note 5 ante.

4 For these purposes, 'a relevant record' means any record which: (1) has been or is to be obtained by a data subject from any specified data controller (see infra) in the exercise of the right conferred by the Data

Protection Act 1998 s 7 (as amended) (see para 524 ante); and (2) contains information relating to any matter specified in relation to that data controller (see *infra*), and includes a copy of such a record or a part of such a record: s 56(6) (not yet in force). A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within the extended definition of 'data' given in s 1(1)(e) (see para 506 text and notes 4-6 ante); s 56(6A) (added by the Freedom of Information Act 2000 s 68(4) as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))). For the meanings of 'data subject' and 'data controller' see para 506 ante.

The specified data controllers are listed in the Data Protection Act 1998 s 56, Table col 1 (not yet in force, but amended by the Police (Northern Ireland) Act 2000 s 78(2)(a)):

- (a) a chief officer of police of a police force in England and Wales;
- (b) a chief constable of a police force in Scotland;
- (c) the Chief Constable of the Police Service of Northern Ireland;
- (d) the Director General of the National Criminal Intelligence Service;
- (e) the Director General of the National Crime Squad;
- (f) the Secretary of State (see para 521 note 2 ante);
- (g) the Department of Health and Social Services for Northern Ireland.

The subject-matters specified in relation to the data controllers specified in heads (a)-(e) *supra* are: (i) convictions; (ii) cautions: see the Data Protection Act 1998 s 56, Table col 2 (not yet in force).

The subject-matters specified in relation to the data controller specified in head (f) *supra* are: (A) convictions; (B) cautions; (C) his functions under the Powers of Criminal Courts (Sentencing) Act 2000 s 92 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 1404), the Criminal Procedure (Scotland) Act 1995 s 205(2) or s 208, or the Children and Young Persons Act (Northern Ireland) 1968 s 73, in relation to any person sentenced to detention; (D) his functions under the Prison Act 1952 (see PRISONS vol 36(2) (Reissue) para 505 et seq), the Prisons (Scotland) Act 1989 or the Prison Act (Northern Ireland) 1953, in relation to any person imprisoned or detained; (E) his functions under the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 or the Jobseekers Act 1995 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 17 et seq); (F) his functions under the Police Act 1997 Pt V (ss 112-127) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 711 et seq): see the Data Protection Act 1998 s 56, Table col 2 (not yet in force, but amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 191).

The subject-matter specified in relation to the data controller specified in head (g) *supra* is its functions under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992 or the Jobseekers (Northern Ireland) Order 1995, SI 1995/2705 (NI 15): see the Data Protection Act 1998 s 56, Table col 2 (not yet in force).

'Caution' means a caution given to any person in England, Wales or Northern Ireland in respect of an offence which, at the time when the caution is given, is admitted; and 'conviction' has the same meaning as in the Rehabilitation of Offenders Act 1974 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660) or the Rehabilitation of Offenders (Northern Ireland) Order 1978, SI 1978/1908 (NI 27): Data Protection Act 1998 s 56(7) (not yet in force).

The Lord Chancellor may by order amend s 56(7) and the Table: s 56(8) (in force in so far as it confers power to make orders (see note 1 *supra*); amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(t)). At the date at which this volume states the law, no such order had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

For the purposes of the Data Protection Act 1998 s 56, a record which states that a data controller is not processing any personal data relating to a particular matter is taken to be a record containing information relating to that matter: s 56(9) (not yet in force). For the meanings of 'processing' (of information or data), 'personal data' and 'data' see para 506 ante.

5 Ibid s 56(1) (not yet in force). A person who contravenes s 56(1) is guilty of an offence: s 56(5) (not yet in force).

6 Ibid s 56(2) (not yet in force). A person who contravenes s 56(2) is guilty of an offence: s 56(5) (not yet in force).

7 For the meaning of 'enactment' see para 506 note 7 ante.

8 Data Protection Act 1998 s 56(3) (not yet in force). Having regard to the provisions of the Police Act 1997 Pt V (ss 112-127) (certificates of criminal records, etc: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 711 et seq), the imposition of the requirement referred to in the Data Protection Act 1998 s 56(1), (2) (see the text and notes 5-6 supra) is not to be regarded as being justified as being in the public interest on the ground that it would assist in the prevention or detection of crime: s 56(4) (not yet in force).

UPDATE

535 Prohibition of requirement as to production of certain records

TEXT AND NOTES--Data Protection Act 1998 s 56 in force 7 July 2008 for further purposes: SI 2008/1592.

NOTE 1--1998 Act s 75(4A) added: Safeguarding Vulnerable Groups Act 2006 Sch 9 para 15(3).

NOTE 4--Freedom of Information Act 2000 s 68(4) now in force 1 January 2005: SI 2004/3122. Heads (d), (e) now head (d) the Director General of the Serious Organised Crime Agency: 1998 Act s 56, Table col 1 (amended by the Serious Organised Crime and Police Act 2005 Sch 4 para 112). In relation to head (f) add head (G) his functions under the Safeguarding Vulnerable Groups Act 2006; and add head (h) the Independent Barring Board in relation to which the subject matter specified is its functions under the Safeguarding Vulnerable Groups Act 2006: 1998 Act s 56, Table cols 1, 2 (amended by the Safeguarding Vulnerable Groups Act 2006 Sch 9 para 15(2)).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(4) RIGHTS OF DATA SUBJECTS AND OTHERS/(iii) Records obtained under Data Subject's Right of Access/536. Avoidance of certain contractual terms relating to health records.

536. Avoidance of certain contractual terms relating to health records.

Any term or condition of a contract is void in so far as it purports to require an individual:

- (1) to supply any other person with a record which:
 - 10. (a) has been or is to be obtained by a data subject¹ in the exercise of the right of access to personal data²; and
 - 11. (b) consists of the information contained in any health record³,
- or with a copy of such a record or a part of such a record⁴; or
- (2) to produce to any other person such a record, copy or part⁵.

1 For the meaning of 'data subject' see para 506 ante.

2 ie the right conferred by the Data Protection Act 1998 s 7 (as amended): see para 524 ante. For the meanings of 'personal data' and 'data' see para 506 ante.

3 Ibid s 57(2). As to health records see s 68(2); and para 506 ante.

4 Ibid s 57(1)(a).

5 Ibid s 57(1)(b).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/537. Prohibition on processing without registration.

(5) NOTIFICATION BY DATA CONTROLLERS

537. Prohibition on processing without registration.

Personal data¹ must not be processed² unless an entry in respect of the data controller³ is included in the register maintained by the Information Commissioner⁴ (or is treated by notification regulations⁵ as being so included)⁶.

If this provision is contravened, the data controller is guilty of an offence⁷.

However, (except where the processing is assessable processing⁸) this provision does not apply in relation to personal data consisting of information which is neither being processed by means of equipment operating automatically in response to instructions given for that purpose, nor is recorded with the intention that it should be processed by means of such equipment⁹.

Nor (except where the processing is assessable processing¹⁰) does the provision as to notification apply where the processing falls within one or more of the following descriptions of processing¹¹:

(1) where the processing is for the purposes of appointments or removals, pay, discipline, superannuation, work management or other personnel matters in relation to the staff¹² of the data controller¹³, and:

- 12. (a) is of personal data in respect of which the data subject is a past, existing or prospective member of staff of the data controller, or any person the processing of whose personal data is necessary for the exempt purposes¹⁴;
- 13. (b) is of personal data consisting of the name, address and other identifiers of the data subject or information as to qualifications, work experience or pay, or other matters the processing of which is necessary for the exempt purposes¹⁵;
- 14. (c) does not involve disclosure of the personal data to any third party other than with the consent of the data subject, or where it is necessary to make such disclosure for the exempt purposes¹⁶; and
- 15. (d) does not involve keeping the personal data after the relationship between the data controller and staff member ends, unless and for so long as it is necessary to do so for the exempt purposes¹⁷; or

(2) where the processing is for the purposes of advertising or marketing the data controller's business, activity, goods or services and promoting public relations in connection with that business or activity, or those goods or services¹⁸, and:

- 16. (a) is of personal data in respect of which the data subject is a past, existing or prospective customer or supplier, or any person the processing of whose personal data is necessary for the exempt purposes¹⁹;

- 17. (b) is of personal data consisting of the name, address and other identifiers of the data subject or information as to other matters the processing of which is necessary for the exempt purposes²⁰;
- 18. (c) does not involve disclosure of the personal data to any third party other than with the consent of the data subject, or where it is necessary to make such disclosure for the exempt purposes²¹; and
- 19. (d) does not involve keeping the personal data after the relationship between the data controller and customer or supplier ends, unless and for so long as it is necessary to do so for the exempt purposes²²; or

(3) where the processing is for the purposes of keeping accounts relating to any business or other activity carried on by the data controller, or deciding whether to accept any person as a customer or supplier, or keeping records of purchases, sales or other transactions for the purpose of ensuring that the requisite payments and deliveries are made or services provided by or to the data controller in respect of those transactions, or for the purpose of making financial or management forecasts to assist him in the conduct of any such business or activity²³, and:

- 20. (a) is of personal data in respect of which the data subject is a past, existing or prospective customer or supplier; or any person the processing of whose personal data is necessary for the exempt purposes²⁴;
- 21. (b) is of personal data consisting of the name, address and other identifiers of the data subject or information as to financial standing; or other matters the processing of which is necessary for the exempt purposes²⁵;
- 22. (c) does not involve disclosure of the personal data to any third party other than with the consent of the data subject, or where it is necessary to make such disclosure for the exempt purposes²⁶; and
- 23. (d) does not involve keeping the personal data after the relationship between the data controller and customer or supplier ends, unless and for so long as it is necessary to do so for the exempt purposes²⁷;

(4) where the processing is carried out by a data controller which is a body or association which is not established or conducted for profit²⁸, and is for the purposes of establishing or maintaining membership of or support for the body or association, or providing or administering activities for individuals who are either members of the body or association or have regular contact with it²⁹, and:

- 24. (a) is of personal data in respect of which the data subject is a past, existing or prospective member of the body or organisation, any person who has regular contact with the body or organisation in connection with the exempt purposes, or any person the processing of whose personal data is necessary for the exempt purposes³⁰;
- 25. (b) is of personal data consisting of the name, address and other identifiers of the data subject or information as to eligibility for membership of the body or association, or other matters the processing of which is necessary for the exempt purposes³¹;
- 26. (c) does not involve disclosure of the personal data to any third party other than with the consent of the data subject, or where it is necessary to make such disclosure for the exempt purposes³²; and
- 27. (d) does not involve keeping the personal data after the relationship between the data controller and data subject ends, unless and for so long as it is necessary to do so for the exempt purposes³³; or

(5) where the processing does not fall within one or more of the descriptions given in heads (1) to (4) above solely by virtue of the fact that disclosure of the

personal data to a person other than those specified in the descriptions is required by or under any enactment, by any rule of law or by the order of a court, or may be made by virtue of an exemption from the non-disclosure provisions³⁴.

- 1 For the meanings of 'personal data' and 'data' see para 506 ante.
- 2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 3 For the meaning of 'data controller' see para 506 note 7 ante.
- 4 Ie maintained by the Commissioner under the Data Protection Act 1998 s 19 (see para 539 post). As to the Commissioner see para 518 ante.

5 Ie regulations made by virtue of *ibid* s 19(3) (see para 539 post). In the Data Protection Act 1998 Pt III (ss 16-26) (as amended), 'notification regulations' means regulations made by the Lord Chancellor under the provisions of Pt III other than fees regulations: s 16(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(h)). As to the regulations made under this provision see the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188 (amended by SI 2001/1149; SI 2001/3214); and notes 11-34 infra. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

6 Data Protection Act 1998 ss 17(1). If it appears to the Lord Chancellor that processing of a particular description is unlikely to prejudice the rights and freedoms of data subjects, notification regulations (see note 5 supra) may provide that, in such cases as may be prescribed, s 17(1) is not to apply in relation to processing of that description: s 17(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(i)). For the meaning of 'data subject' see para 506 ante. In the Data Protection Act 1998 Pt III, 'prescribed', except where used in relation to fees regulations, means prescribed by notification regulations: s 16(2). For the meaning of 'fees regulations' see para 538 note 9 post. Section 17(1) does not apply in relation to any processing whose sole purpose is the maintenance of a public register: s 17(4). 'Public register' means any register which pursuant to a requirement imposed: (1) by or under any enactment; or (2) in pursuance of any international agreement, is open to public inspection or open to inspection by any person having a legitimate interest: s 70(1). For the meaning of 'enactment' see para 506 note 7 ante.

7 *Ibid* s 21(1).

8 Ie except where the processing is assessable processing for the purposes of *ibid* s 22 (see para 541 post): s 17(2).

9 Ie in relation to personal data consisting of information which falls within neither head (1) nor head (2) of the definition of 'data' (ie as set out in para 506 ante): *ibid* s 17(2).

10 See note 8 supra.

11 Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 3(a).

12 For these purposes, 'staff' includes employees or office holders, workers within the meaning given in the Trade Union and Labour Relations (Consolidation) Act 1992 s 296 (see EMPLOYMENT vol 40 (2009) PARA 847), persons working under any contract for services, and volunteers: Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, Schedule para 1.

13 *Ibid* Schedule para 2(a).

14 *Ibid* Schedule para 2(b). For the purposes of the Schedule paras 2-4, 'exempt purposes' means the purposes specified in the Schedule para 2(a) (see the text to note 13 supra), the Schedule para 3(a) (see the text to note 18 infra), the Schedule para 4(1)(a) (see the text to note 23 infra), and the Schedule para 5(b) (see the text to note 29 infra): Schedule para 1.

15 *Ibid* Schedule para 2(c).

16 *Ibid* Schedule para 2(d).

17 *Ibid* Schedule para 2(e).

18 *Ibid* Schedule para 3(a).

19 *Ibid* Schedule para 3(b).

20 Ibid Schedule para 3(c).

21 Ibid Schedule para 3(d).

22 Ibid Schedule para 3(e).

23 Ibid Schedule para 4(1)(a).

24 Ibid Schedule para 4(1)(b).

25 Ibid Schedule para 4(1)(c). This provision is not to be taken as including personal data processed by or obtained from a credit reference agency: Schedule para 4(2). For the meaning of 'credit reference agency' see para 525 note 12 ante.

26 Ibid Schedule para 4(1)(d).

27 Ibid Schedule para 4(1)(e).

28 Ibid Schedule para 5(a).

29 Ibid Schedule para 5(b).

30 Ibid Schedule para 5(c).

31 Ibid Schedule para 5(d).

32 Ibid Schedule para 5(e).

33 Ibid Schedule para 5(f).

34 Ie the non-disclosure provisions as defined in the Data Protection Act 1998 s 27(3) (see para 547 note 8 post): Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 3(b).

UPDATE

537 Prohibition on processing without registration

NOTE 11--SI 2000/188 reg 3(a) amended: SI 2009/1677.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/538. Notification by data controllers.

538. Notification by data controllers.

Any data controller¹ who wishes to be included in the register² must give a notification to the Information Commissioner³. Such a notification must specify in accordance with notification regulations⁴: (1) the registrable particulars⁵; and (2) a general description of measures to be taken for the purpose of complying with the seventh data protection principle⁶. Notification regulations may also make provision as to the giving of notification: (a) by partnerships⁷; or (b) in other cases where two or more persons are the data controllers in respect of any personal data⁸. The notification must be accompanied by such fee as may be prescribed by fees regulations⁹.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 Ie the register maintained under the Data Protection Act 1998 s 19 (see para 539 post).

3 Ie a notification given to the Commissioner under ibid s 18: s 18(1). As to the Commissioner see para 518 ante.

4 For the meaning of 'notification regulations' see para 537 note 5 ante.

5 In the Data Protection Act 1998 Pt III (ss 16-26) (as amended), 'the registrable particulars', in relation to a data controller, means:

(1) his name and address (s 16(1)(a));

(2) if he has nominated a representative for the purposes of the Data Protection Act 1998, the name and address of the representative (s 16(1)(b));

(3) a description of the personal data being or to be processed by or on behalf of the data controller and of the category or categories of data subject to which it relates (s 16(1)(c));

(4) a description of the purpose or purposes for which the data is being or is to be processed (s 16(1)(d));

(5) a description of any recipient or recipients to whom the data controller intends or may wish to disclose the data (s 16(1)(e));

(6) the names, or a description of, any countries or territories outside the European Economic Area to which the data controller directly or indirectly transfers, or intends or may wish directly or indirectly to transfer, the data (s 16(1)(f));

(7) where the data controller is a public authority, a statement of that fact (s 16(1)(ff) (added by the Freedom of Information Act 2000 s 71 as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))); and

(8) in any case where: (a) personal data is being, or is intended to be, processed in circumstances in which the prohibition in the Data Protection Act 1998 s 17(1) is excluded by s 17(2) or s 17(3) (see para 537 ante); and (b) the notification does not extend to the data, a statement of that fact: s 16(1)(g).

For the meanings of 'data', 'personal data', 'processing' (of information or data), 'data subject' and 'disclosing' (of personal data) see para 506 ante. For the meaning of 'recipient' see para 524 note 5 ante. For the purposes of Pt III, so far as it relates to the addresses of data controllers: (i) the address of a registered company is that of its registered office; and (ii) the address of a person (other than a registered company) carrying on a business is that of his principal place of business in the United Kingdom: s 16(3). 'Registered company' means a company registered under the enactments relating to companies for the time being in force in the United Kingdom: s 70(1). For the meaning of 'European Economic Area' see para 504 note 5 ante; and for the meaning of 'United Kingdom' see para 504 note 4 ante. For the meaning of 'enactment' see para 506 note 7 ante. As to enactments relating to companies see COMPANIES vol 14 (2009) PARAS 1, 16. 'Business' includes any trade or profession: s 70(1).

6 Ibid s 18(2). As to the seventh data protection principle see para 516 ante. Notification regulations made by virtue of s 18(2) may provide for the determination by the Commissioner, in accordance with any requirements of the regulations, of the form in which the registrable particulars and the description mentioned in head (2) in the text are to be specified, including in particular the detail required for the purposes of s 16(1) (c), (d), (e) and (f) (see heads (3)-(6) in note 5 supra) and s 18(2)(b) (see head (2) in the text): s 18(3). As to the regulations that have been made see the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 4(1).

7 In any case in which two or more persons carrying on a business in partnership are the data controllers in respect of any personal data for the purposes of that business, a notification under the Data Protection Act 1998 s 18 or under the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12 (see para 540 post) may be given in respect of those persons in the name of the firm (reg 5(1)); and where such a notification is given, the name to be specified for the purposes of the Data Protection Act 1998 s 16(1)(a) (see head (1) in note 5 supra) is the name of the firm, and the address to be specified for those purposes is the address of the firm's principal place of business (Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 5(2)).

8 Data Protection Act 1998 s 18(4). In any case in which a governing body of, and a head teacher at, any school are, in those capacities, the data controllers in respect of any personal data, notification under s 18 or under the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12 (see para 540 post) may be given in respect of that governing body and head teacher in the name of the school; and the name and address to be specified for the purposes of the Data Protection Act 1998 s 16(1)(a) are those of the school: Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 6.

9 Data Protection Act 1998 s 18(5). For the meaning of 'prescribed' see para 537 note 6 ante. In Pt III, 'fees regulations' means regulations made by the Lord Chancellor under ss 18(5), 19(4), (7): s 16(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(h)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq. Notification regulations may provide for any fee paid under the Data Protection Act 1998 s 18(5) to be refunded in prescribed circumstances: s 18(6). As to the fees payable to accompany notification under s 18 see the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 7.

UPDATE

538 Notification by data controllers

NOTE 5--Head (7). Now as from 1 January 2005: SI 2004/3122.

NOTE 9--SI 2000/188 reg 7 substituted, reg 7A added: SI 2009/1677.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/539. Register of notifications.

539. Register of notifications.

The Information Commissioner¹ must: (1) maintain a register of persons who have given notification²; and (2) make an entry in the register in pursuance of each notification received by him from a person in respect of whom no entry as data controller³ was for the time being included in the register⁴. Each entry in the register must consist of: (a) the registrable particulars⁵ or, as the case requires, those particulars as amended⁶; and (b) such other information as the Commissioner may be authorised or required by notification regulations⁷ to include in the register⁸.

Under the notification regulations, in addition to the matters mentioned in head (a) above, the Commissioner may include in a register entry⁹: (i) a registration number issued by the Commissioner in respect of that entry¹⁰; (ii) the date on which the entry is treated as having been included in pursuance of a notification¹¹; (iii) the date on which the entry falls or may fall to be removed¹²; and (iv) information additional to the registrable particulars for the purpose of assisting persons consulting the register to communicate with any data controller to whom the entry relates concerning matters relating to the processing of personal data¹³.

Notification regulations may make provision as to the time as from which any entry in respect of a data controller is to be treated¹⁴ as having been made in the register¹⁵. Under the notification regulations¹⁶, the time from which an entry in respect of a data controller who has given a notification¹⁷ in accordance with the regulations is to be treated for the purposes of the Data Protection Act 1998¹⁸ as having been made in the register is as follows¹⁹: (A) in the case of a data controller who has given the notification by sending it by registered post or the recorded delivery service, the day after the day on which it is received for dispatch by the postal operator concerned²⁰; and (B) in the case of a data controller who has given a notification by some other means, the day on which it is received by the Commissioner²¹.

No entry may be retained in the register for more than the relevant time²² except on payment of such fee as may be prescribed by fees regulations²³. The Commissioner must provide facilities for making the information contained in the entries in the register available for inspection (in visible and legible form) by members of the public at all reasonable hours and free of charge, and may also provide such other facilities for making the information contained in those entries available to the public free of charge as he considers appropriate²⁴. The Commissioner must, on payment of such fee, if any, as may be prescribed by fees regulations, supply any member of the public with a duly certified copy in writing of the particulars contained in any entry made in the register²⁵.

- 1 As to the Commissioner see para 518 ante.
- 2 Ie notification given under the Data Protection Act 1998 s 18 (see para 538 ante): s 19(1)(a).
- 3 For the meaning of 'data controller' see para 506 note 7 ante.
- 4 Data Protection Act 1998 s 19(1)(b). The Commissioner must, as soon as practicable and in any event within a period of 28 days after making an entry in the register under s 19(1)(b), give the data controller to whom the register entry relates notice confirming the register entry; and such a notice must include a statement of: (1) the date on which the entry is treated as having been included by virtue of the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 8 (see notes 16-21 infra); and (2) the particulars entered in the register, or the amendment made, in pursuance of the notification: reg 10.
- 5 Ie the registrable particulars notified under the Data Protection Act 1998 s 18: see para 538 ante. For the meaning of 'the registrable particulars' see para 538 note 5 ante.
- 6 Ie in pursuance of ibid s 20(4): see para 540 post.
- 7 For the meaning of 'notification regulations' see para 537 note 5 ante.
- 8 Data Protection Act 1998 s 19(2)(a), (b).
- 9 Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 11.
- 10 Ibid reg 11(a).
- 11 Ie in pursuance of a notification under the Data Protection Act 1998 s 18 (see para 538 ante): Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 11(b).
- 12 Ibid reg 11(c). The reference in the text is a reference to the date on which the entry falls or may fall to be removed by virtue of reg 14 or reg 15 (see note 23 infra).
- 13 Ibid reg 11(d).
- 14 Ie for the purposes of the Data Protection Act 1998 s 17 (see para 537 ante).
- 15 Ibid s 19(3).
- 16 Ie the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188.
- 17 Ie given a notification under the Data Protection Act 1998 s 18: see para 538 ante.
- 18 Ie for the purposes of ibid s 17: see para 537 ante.
- 19 Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 8(1).
- 20 Ibid reg 8(2) (amended by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, art 3(1), Sch 1 para 137). The reference in the text to a postal operator is a reference to a postal operator within the meaning of the Postal Services Act 2000: see POST OFFICE.
- 21 Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 8(3).
- 22 For these purposes, 'the relevant time' means 12 months or such other period as may be prescribed by notification regulations; and different periods may be prescribed in relation to different cases: Data Protection

Act 1998 s 19(5). As to the period prescribed see the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 15; and note 23 infra).

23 Data Protection Act 1998 s 19(4). As to the fee payable in relation to any entry in respect of a person which is for the time being included, or which by virtue of the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 8 (see notes 16-21 supra) is treated as being included, in the register, other than an entry to which reg 15 applies, see reg 14. Where an entry in respect of a person is for the time being included in the register under the Data Protection Act 1998 Sch 14 para 2(6) or, as the case may be, such an entry as amended in pursuance of the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12 (including that regulation as modified by reg 13) (see para 540 post), the Data Protection Act 1998 s 19(4), (5) is modified by the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 15 so that no entry may be retained in the register after: (1) the end of the registration period; or (2) the date on which the data controller gives a notification under the Data Protection Act 1998 s 18 (see para 538 ante): s 19(4) (as so modified). For these purposes, 'the registration period', in relation to a person, means:

(a) where there is a single entry in respect of that person as a data user, the period at the end of which, if the Data Protection Act 1984 s 8 (repealed) had remained in force, that entry would have fallen to be removed unless renewed (s 19(5) (as so modified), Sch 14 para 2(2)(a)); and

(b) where there are two or more entries in respect of that person as a data user, the period at the end of which, if s 8 (repealed) had remained in force, the last of those entries to expire would have fallen to be removed unless renewed (s 19(5) (as so modified), Sch 14 para 2(2)(b)).

The Commissioner must include in the register maintained under the Data Protection Act 1998 s 19 an entry in respect of each person who is exempt from s 17(1) until the end of the registration period by virtue of the fact that, immediately before the commencement of Pt III (ss 16-26) (ie 1 March 2000) he:

- (i) was registered as a data user under the Data Protection Act 1984 Pt II (repealed); or
- (ii) was treated by virtue of s 7(6) (repealed) as so registered (Data Protection Act 1998 Sch 14 para 2(1)),

and each entry must consist of the particulars which, immediately before the commencement of Pt III, were included (or treated as included) in respect of that person in the register maintained under the Data Protection Act 1984 s 4 (repealed): Data Protection Act 1998 Sch 14 para 2(1), (6).

Notification regulations may provide for any fee paid under s 19(4) to be refunded in prescribed circumstances: s 18(6). At the date at which this volume states the law, no such regulations had been made.

24 Ibid s 19(6).

25 Ibid s 19(7). As to the prescribed fees see the Data Protection (Fees under section 19(7)) Regulations 2000, SI 2000/187.

UPDATE

539 Register of notifications

NOTE 23--SI 2000/188 reg 14 amended: SI 2009/1677.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/540. Duty to notify changes.

540. Duty to notify changes.

For the purpose of ensuring, so far as practicable, that at any time:

- (1) the entries in the register¹ contain current names and addresses² and describe the current practice or intentions of the data controller³ with respect to the processing⁴ of personal data⁵; and
- (2) the Information Commissioner⁶ is provided with a general description of measures currently being taken⁷,

notification regulations⁸ must include provision imposing on every person in respect of whom an entry as a data controller is for the time being included in the register a duty to notify to the Commissioner, in such circumstances and at such time or times and in such form as may be prescribed⁹, such matters relating to the registrable particulars¹⁰ and measures taken¹¹ as may be prescribed¹².

Under the regulations¹³, every person in respect of whom an entry is for the time being included in the register is under a duty to give the Commissioner a notification specifying any respect in which¹⁴: (a) that entry becomes inaccurate or incomplete as a statement of his current registrable particulars¹⁵; or (b) the general description of measures notified¹⁶ or, as the case may be, that description as amended in pursuance of a notification under the regulations, becomes inaccurate or incomplete¹⁷, and setting out the changes which need to be made to that entry or general description in order to make it accurate and complete¹⁸.

On receiving any notification under notification regulations, the Commissioner must make such amendments of the relevant entry in the register as are necessary to take account of the notification¹⁹.

1 Ie the register maintained under the Data Protection Act 1998 s 19: see para 539 ante.

2 For the meaning of 'address' see para 538 note 5 ante.

3 For the meaning of 'data controller' see para 506 note 7 ante.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 Data Protection Act 1998 s 20(2)(a). For the meanings of 'personal data' and 'data' see para 506 ante.

6 As to the Commissioner see para 518 ante.

7 Data Protection Act 1998 s 20(2)(b). The reference in the text is a reference to a general description of measures as mentioned in s 18(2)(b): see para 538 head (2) ante.

8 For the meaning of 'notification regulations' see para 537 note 5 ante.

9 Ie by notification regulations: see para 537 note 6 ante.

10 For the meaning of 'the registrable particulars' see para 538 note 5 ante.

11 Ie the measures taken as mentioned in the Data Protection Act 1998 s 18(2)(b): see para 538 head (2) ante.

12 Ibid s 20(1). See the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12; and notes 13-18 infra. The Data Protection Act 1998 s 18(3) (see para 538 ante) has effect in relation to notification regulations made by virtue of s 20(1) as it has effect in relation to notification regulations made by virtue of s 18(2): s 20(3).

Any person who fails to comply with the duty imposed by notification regulations made by virtue of s 20(1) is guilty of an offence: s 21(2). It is a defence for a person charged with an offence under s 21(2) to show that he exercised all due diligence to comply with the duty: s 21(3).

13 Ie under the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188.

14 Ibid reg 12(1). This regulation is subject to reg 13 (see note 18 infra): reg 12(1).

15 Ibid reg 12(1)(a).

16 le notified under the Data Protection Act 1998 s 18(2)(b): see para 538 ante.

17 Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12(1)(b).

18 Ibid reg 12(1). Such a notification must be given as soon as practicable and in any event within a period of 28 days from the date on which the entry or, as the case may be, the general description, becomes inaccurate or incomplete: reg 12(2). For these purposes, references to an entry being included in the register include any entry being treated under reg 8 (see para 539 ante) as being so included: reg 12(3). The Commissioner must determine the form in which a notification under reg 12 is to be specified: reg 4(2).

Where an entry in the register has been made under the Data Protection Act 1998 Sch 14 para 2(6) (see para 539 note 23 ante), the duty imposed by the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 12 is modified (reg 13(1), (2)) so that every person in respect of whom an entry is for the time being included in the register is under a duty to give the Commissioner a notification specifying:

- (1) his name and address, in any case in which a change to his name or address results in the entry in respect of him no longer including his current name and address (reg 13(3)(a));
- (2) to the extent to which the entry relates to eligible data;
- 7. (a) a description of any eligible data being or to be processed by him or on his behalf, in any case in which such processing is of personal data of a description not included in that entry;
- 8. (b) a description of the category or categories of data subject to which eligible data relates, in any case in which such category or categories are of a description not included in that entry;
- 9. (c) a description of the purpose or purposes for which eligible data is being or is to be processed in any case in which such processing is for a purpose or purposes of a description not included in that entry;
- 10. (d) a description of the source or sources from which he intends or may wish to obtain eligible data, in any case in which such obtaining is from a source of a description not included in that entry;
- 11. (e) a description of any recipient or recipients to whom he intends or may wish to disclose eligible data, in any case in which such disclosure is to a recipient or recipients of a description not included in that entry; and
- 12. (f) the names, or a description of, any countries or territories outside the United Kingdom to which he directly or indirectly transfers, or intends or may wish directly or indirectly to transfer, eligible data, in any case in which such transfer would be to a country or territory not named or described in that entry (reg 13(3)(b)); and
- (3) to the extent to which head (2) supra does not apply, any respect in which the entry is or becomes inaccurate or incomplete as:
- 13. (a) a statement of his current registrable particulars to the extent mentioned in the Data Protection Act 1998 s 16(1)(c), (d), (e) (see para 538 ante);
- 14. (b) a description of the source or sources from which he currently intends or may wish to obtain personal data; and
- 15. (c) the names or a description of any countries or territories outside the United Kingdom to which he currently intends or may wish directly or indirectly to transfer personal data (Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 13(3)(c)),

and setting out the changes which need to be made to that entry in order to make it accurate and complete in those respects: reg 13(3). For these purposes, personal data is 'eligible data' at any time if, and to the extent that, it is at that time subject to processing which was already under way immediately before 24 October 1998: reg 13(5). For the meaning of 'United Kingdom' see para 504 note 4 ante.

Such a notification must be given as soon as practicable and in any event within a period of 28 days from the date on which: (i) in the case of a notification under head (1) supra, the entry no longer includes the current name and address; or (ii) in the case of a notification under head (2) supra, the specified practice or intentions are in the particulars there mentioned of a description not included in the entry; and (iii) in the case of a notification under head (3) supra, the entry becomes inaccurate or incomplete in the particulars there mentioned: reg 13(4).

19 Data Protection Act 1998 s 20(4). The Commissioner must, as soon as practicable and in any event within a period of 28 days after amending an entry in the register under s 20(4), give the data controller to whom the register entry relates notice confirming the register entry; and such a notice must include a statement of: (1) the date on which the notification was received by the Commissioner; and (2) the particulars entered in the register, or the amendment made, in pursuance of the notification: Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 10.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/541. Preliminary assessment by the Information Commissioner.

541. Preliminary assessment by the Information Commissioner.

On receiving notification from any data controller¹ or under notification regulations², the Information Commissioner³ must consider: (1) whether any of the processing⁴ to which the notification relates is assessable processing⁵; and (2) if so, whether the assessable processing is likely to comply with the provisions of the Data Protection Act 1998⁶. The Commissioner must, within the period of 28 days beginning with the day on which he receives a notification which relates to assessable processing, give a notice to the data controller stating the extent to which the Commissioner is of the opinion that the processing is likely or unlikely to comply with the provisions of the Data Protection Act 1998⁷.

1 Ie under the Data Protection Act 1998 s 18: see para 538 ante. For the meaning of 'data controller' see para 506 note 7 ante.

2 Ie made by virtue of ibid s 20: see para 540 ante. For the meaning of 'notification regulations' see para 537 note 5 ante.

3 As to the Commissioner see para 518 ante.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 Data Protection Act 1998 s 22(2)(a). In s 22, 'assessable processing' means processing which is of a description specified in an order made by the Lord Chancellor as appearing to him to be particularly likely: (1) to cause substantial damage or substantial distress to data subjects; or (2) otherwise significantly to prejudice the rights and freedoms of data subjects: s 22(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(j)). For the meaning of 'data subject' see para 506 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

In any case in which the Commissioner considers under the Data Protection Act 1998 s 22(2)(a) that any of the processing to which a notification relates is assessable processing within the meaning of that provision, he must, within 10 days of receipt of the notification, give a written notice to the data controller who has given the notification, acknowledging its receipt; and such a notice must indicate the date on which the Commissioner received the notification, and the processing which the Commissioner considers to be assessable processing: Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188, reg 9.

6 Data Protection Act 1998 s 22(2)(b).

7 Ibid s 22(3). Before the end of the period referred to in s 22(3) the Commissioner may, by reason of special circumstances, extend that period on one occasion only by notice to the data controller by such further period not exceeding 14 days as the Commissioner may specify in the notice: s 22(4).

No assessable processing in respect of which a notification has been given to the Commissioner as mentioned in s 22(2) (see the text and notes 1-6 *supra*) may be carried on unless either: (1) the period of 28 days beginning with the day on which the notification is received by the Commissioner (or, in a case falling within s 22(4), that period as extended under that provision) has elapsed; or (2) before the end of that period (or that period as so extended) the data controller has received a notice from the Commissioner under s 22(3) in respect of the processing: s 22(5). Where s 22(5) is contravened, the data controller is guilty of an offence: s 22(6).

The Lord Chancellor may by order amend s 22(3), (4) and (5) by substituting for the number of days for the time being specified there a different number specified in the order: s 22(7) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(j)). At the date at which this volume states the law, no such order had been made.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/542. Duty of certain data controllers to make certain information available.

542. Duty of certain data controllers to make certain information available.

Where certain personal data¹ is processed², the data controller must, within 21 days of receiving a written request from any person, make the relevant particulars available to that person in writing free of charge³. These provisions have effect subject to any exemption conferred for these purposes by notification regulations⁴. Any data controller who fails to comply with the duty mentioned above⁵ is guilty of an offence⁶.

1 For the meanings of 'personal data' and 'data' see para 506 *ante*.

2 Ie in a case where: (1) by virtue of the Data Protection Act 1998 s 17(2) or (3), s 17(1) does not apply to the processing (see para 537 *ante*); and (2) the data controller has not notified the relevant particulars in respect of that processing under s 18 (see para 538 *ante*). For the meanings of 'processing' (of information or data) and 'data controller' see para 506 *ante*. In s 24, 'the relevant particulars' means the particulars referred to in s 16(1)(a)-(f) (see para 538 note 5 heads (1)-(6) *ante*): s 24(2).

3 Ibid s 24(1).

4 Ibid s 24(3). For the meaning of 'notification regulations' see para 537 note 5 *ante*.

5 Ie the duty imposed by *ibid* s 24(1) (see the text and note 3 *supra*).

6 Ibid s 24(4). It is a defence for a person charged with an offence under s 24(4) to show that he exercised all due diligence to comply with the duty: s 24(5).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/543. Functions of the Information Commissioner in relation to making of notification regulations.

543. Functions of the Information Commissioner in relation to making of notification regulations.

The Information Commissioner¹ must keep under review the working of notification regulations² and may from time to time submit to the Lord Chancellor proposals as to amendments to be made to the regulations³. The Lord Chancellor may from time to time require the Commissioner to consider any matter relating to notification regulations and to submit to him proposals as to amendments to be made to the regulations in connection with that matter⁴. Before making any notification regulations, the Lord Chancellor must: (1) consider any proposals made to him by the Commissioner under the provisions described above⁵; and (2) consult the Commissioner⁶.

1 As to the Commissioner see para 518 ante.

2 As soon as practicable after the passing of the Data Protection Act 1998 (ie 16 July 1998), the Information Commissioner had to submit proposals as to the provisions to be included in the first notification regulations: s 25(1). For the meaning of 'notification regulations' see para 537 note 5 ante.

3 Ibid s 25(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(l)). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

4 Data Protection Act 1998 s 25(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(l)).

5 Ie under the Data Protection Act 1998 s 25(2) or (3): see the text and notes 1-4 supra.

6 Ibid s 25(4) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(l), (2)).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(5) NOTIFICATION BY DATA CONTROLLERS/544. Fees regulations.

544. Fees regulations.

Fees regulations¹ prescribing fees for the purposes of any provision of Part III of the Data Protection Act 1998² may provide for different fees to be payable in different cases³. In making any fees regulations, the Lord Chancellor must have regard to the desirability of securing that the fees payable to the Information Commissioner are sufficient to offset⁴: (1) the expenses incurred by the Commissioner and the Information Tribunal⁵ in discharging their functions⁶ and any expenses of the Lord Chancellor in respect of the Commissioner or the Tribunal so far as attributable to their functions; and (2) to the extent that the Lord Chancellor considers appropriate: (a) any deficit previously incurred (whether before or after 16 July 1998)⁷ in respect of the expenses mentioned in head (1) supra; and (b) expenses incurred or to be incurred by the Lord Chancellor in respect of the inclusion of any officers or staff of the Commissioner in any scheme under the Superannuation Act 1972⁸.

1 For the meaning of 'fees regulations' see para 538 note 9 ante.

2 Ie the Data Protection Act 1998 Pt III (ss 16-26) (as amended).

3 Ibid s 26(1). As to the regulations that have been made see the Data Protection (Notification and Notification Fees) Regulations 2000, SI 2000/188 (amended by SI 2001/1149; 2001/3214).

4 As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq. As to the Commissioner see para 518 ante.

5 As to the Tribunal see para 521 ante.

6 le under the Data Protection Act 1998.

7 le the date on which the Data Protection Act 1998 was passed.

8 Ibid s 26(2) (amended by the Freedom of Information Act 2000 s 18(4), Sch 2 Pt II para 17; and the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(m)). As to schemes under the Superannuation Act 1972 see s 1; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 567.

UPDATE

544 Fees regulations

NOTE 3--SI 2008/188 further amended: SI 2009/1677.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/545. Introduction.

(6) EXEMPTIONS

545. Introduction.

References in any of the data protection principles¹ or any provision of Parts II and III of the Data Protection Act 1998² to personal data³ or to the processing⁴ of personal data do not include references to data or processing which by virtue of Part IV of the Data Protection Act 1998⁵ is exempt from that principle or other provision⁶. Except as provided by Part IV of the Data Protection Act 1998, the subject information provisions⁷ have effect notwithstanding any enactment⁸ or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information⁹.

1 As to the data protection principles see para 507 et seq ante.

2 le the Data Protection Act 1998 Pt II (ss 7-15) (as amended) and Pt III (ss 16-26) (as amended) respectively.

3 For the meanings of 'personal data' and 'data' see para 506 ante.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 le the Data Protection 1998 Pt IV (ss 27-39) (as amended).

6 Ibid s 27(1).

7 In ibid Pt IV (as amended), 'the subject information provisions' means: (1) the first data protection principle to the extent to which it requires compliance with Sch 1 Pt II para 2 (see para 508 ante); and (2) the provisions of s 7 (as amended) (see para 524 ante): s 27(2).

8 For the meaning of 'enactment' see para 506 note 7 ante.

9 Data Protection Act 1998 s 27(5).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/546. National security.

546. National security.

Personal data¹ is exempt from certain provisions of the Data Protection Act 1998² if the exemption from that provision is required for the purpose of safeguarding national security³. A certificate signed by a Minister of the Crown⁴ certifying that exemption from all or any of those provisions is or at any time was required for the purpose there mentioned in respect of any personal data is conclusive evidence of that fact⁵. Such a certificate may identify the personal data to which it applies by means of a general description and may be expressed to have prospective effect⁶. Any person directly affected by the issuing of a certificate may appeal to the Information Tribunal⁷ against the certificate⁸. Where in any proceedings under or by virtue of the Data Protection Act 1998 it is claimed by a data controller⁹ that a certificate which identifies the personal data to which it applies by means of a general description applies to any personal data, any other party to the proceedings may appeal to the Tribunal on the ground that the certificate does not apply to the personal data in question and, subject to any determination¹⁰, the certificate is conclusively presumed so to apply¹¹. A document purporting to be a certificate must be received in evidence and deemed to be such a certificate unless the contrary is proved¹². A document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that minister is in any legal proceedings evidence of that certificate¹³. The power conferred on a Minister of the Crown is not exercisable except by a minister who is a member of the Cabinet or by the Attorney General¹⁴.

No power conferred by any provision of Part V of the Data Protection Act 1998¹⁵ may be exercised in relation to personal data which by virtue of the provisions described above is exempt from that provision¹⁶.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 Ie any of: (1) the data protection principles (see para 507 et seq ante); (2) the Data Protection Act 1998 Pt II (ss 7-15) (as amended), Pt III (ss 16-26) (as amended) and Pt V (ss 40-50); and (3) the provisions of s 55 (see para 567 post).

3 Ibid s 28(1).

4 For the meaning of 'Minister of the Crown' see para 509 note 13 ante.

5 Ibid s 28(2). This provision is subject to s 28(4) (see the text and note 8 infra).

6 Ibid s 28(3).

7 As to the Tribunal see para 521 ante.

8 Data Protection Act 1998 s 28(4). If on an appeal under s 28(4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate: s 28(5).

Schedule 6 (as amended) (see paras 570, 574 post) has effect in relation to appeals under s 28(4) or s 28(6) (see the text and note 11 infra) and the proceedings of the Tribunal in respect of any such appeal: s 28(12). As to national security appeals under the Data Protection Act 1998 see para 572 et seq post. As to appeals generally see also the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189 (amended by SI 2001/1149; SI 2002/2722); the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (amended by SI 2001/1149); the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731 (amended by SI 2001/1149); and para 568 et seq post. The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

9 For the meaning of 'data controller' see para 506 note 7 ante.

10 Ie under the Data Protection Act 1998 s 28(7) (see note 11 infra).

11 Ibid s 28(6). See note 8 supra. On any appeal under s 28(6), the Tribunal may determine that the certificate does not so apply: s 28(7).

12 Ibid s 28(8).

13 Ibid s 28(9).

14 Ibid s 28(10) (amended by the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999, SI 1999/679, art 2 Sch). The power is also exercisable by the Lord Advocate General for Scotland: see the Data Protection Act 1998 s 28(10) (as so amended).

15 Ie ibid Pt V (ss 40-50) (see para 559 et seq post).

16 Ibid s 28(11).

UPDATE

546 National security

TEXT AND NOTE 3--Data Protection Act 1998 s 28(1) amended: Crime (International Co-operation) Act 2003 Sch 5 para 69.

NOTE 3--See Case C-524/06 *Huber v Bundesrepublik Deutschland* [2009] All ER (EC) 239, ECJ (database containing information on foreign nationals working in member state was discriminatory and not justified on ground of national security).

NOTE 8--SI 2000/189 replaced: Information Tribunal (Enforcement Appeals) Rules 2005, SI 2005/14 (amended by SI 2005/450). SI 2000/206 replaced: Information Tribunal (National Security Appeals) Rules 2005, SI 2005/13.

The Information Commissioner is entitled to appeal under the 1998 Act s 28(4) against the issue of a certificate of exemption: *R (on the application of the Secretary of State for the Home Department) v Information Tribunal* [2006] EWHC 2958 (Admin), [2007] 2 All ER 703, DC.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/547. Crime and taxation.

547. Crime and taxation.

Personal data¹ processed² for any of the following purposes:

- (1) the prevention or detection of crime;
- (2) the apprehension or prosecution of offenders; or
- (3) the assessment or collection of any tax or duty or of any imposition of a similar nature,

is exempt from certain provisions of the Data Protection Act 1998³ in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned above⁴. Personal data which:

- (a) is processed for the purpose of discharging statutory functions; and
- (b) consists of information obtained for such a purpose from a person who had it in his possession for any of the purposes mentioned in heads (1) to (3) above⁵,

is exempt from the subject information provisions⁶ to the same extent as personal data processed for any of those purposes⁷. Personal data is exempt from the non-disclosure provisions⁸ in any case in which the disclosure is for any of the purposes mentioned in heads (1) to (3) above⁹ and the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned there¹⁰. Personal data in respect of which the data controller¹¹ is a relevant authority¹² and which:

- (i) consists of a classification applied to the data subject¹³ as part of a system of risk assessment which is operated by that authority for either of the following purposes: (A) the assessment or collection of any tax or duty or any imposition of a similar nature; or (B) the prevention or detection of crime, or apprehension or prosecution of offenders, where the offence concerned involves any unlawful claim for any payment out of, or any unlawful application of, public funds¹⁴; and
- (ii) is processed for either of those purposes,

is exempt from provisions relating to the right of access to personal data¹⁵ to the extent to which the exemption is required in the interests of the operation of the system¹⁶.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 Ie (1) the first data protection principle (see para 508 ante) (except to the extent to which it requires compliance with the conditions in the Data Protection Act 1998 Sch 2 (see para 509 ante) and Sch 3 (see para 510 ante)); and (2) the provisions of s 7 (as amended) (see para 524 ante).

4 Ibid s 29(1).

5 Ie mentioned in ibid s 29(1) (see the text and notes 1-4 supra).

6 For the meaning of 'the subject information provisions' see para 545 note 7 ante.

7 Data Protection Act 1998 s 29(2).

8 In ibid Pt IV (ss 27-39) (as amended), 'the non-disclosure provisions' means the provisions specified in s 27(4) to the extent to which they are inconsistent with the disclosure in question: s 27(3). The specified provisions are: (1) the first data protection principle, except to the extent to which it requires compliance with the conditions in Sch 2 (see para 509 ante) and Sch 3 (see para 510 ante); (2) the second, third, fourth and fifth data protection principles (see paras 511-514 ante); and (3) the provisions of s 10 (see para 526 ante) and s 14(1)-(3) (see para 531 ante): s 27(4).

9 Ie mentioned in ibid s 29(1) (see the text and notes 1-4 supra).

10 Ibid s 29(3). The matters referred to in the text are those mentioned in s 29(1) (see the text and notes 1-4 supra).

11 For the meaning of 'data controller' see para 506 note 7 ante.

12 For these purposes, 'relevant authority' means: (1) a government department; (2) a local authority; or (3) any other authority administering housing benefit or council tax benefit: Data Protection Act 1998 s 29(5). 'Government department' includes a Northern Ireland department and any body or authority exercising statutory functions on behalf of the Crown: s 70(1).

13 For the meaning of 'data subject' see para 506 ante.

14 For these purposes, 'public funds' includes funds provided by any Community institution: Data Protection Act 1998 s 29(5).

15 Ie ibid s 7 (as amended): see para 524 ante.

16 Ibid s 29(4).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/548. Health, education and social work.

548. Health, education and social work.

The Lord Chancellor may by order exempt from the subject information provisions¹, or modify those provisions in relation to:

- (1) personal data² consisting of information as to the physical or mental health or condition of the data subject³;
- (2) personal data in respect of which the data controller⁴ is the proprietor⁵ of, or a teacher⁶ at, a school⁷, and which consists of information relating to persons who are or have been pupils⁸ at the school⁹;
- (3) personal data of such other descriptions as may be specified in the order, being information:

- 28. (a) processed¹⁰ by government departments¹¹ or local authorities or by voluntary organisations or other bodies designated by or under the order; and
- 29. (b) appearing to him to be processed in the course of, or for the purposes of, carrying out social work in relation to the data subject or other individuals,

but the Lord Chancellor must not confer any exemption or make any modification under head (3) except so far as he considers that the application to the data of those provisions (or of those provisions without modification) would be likely to prejudice the carrying out of social work¹².

An order made under these provisions may make different provision in relation to data consisting of information of different descriptions¹³.

1 For the meaning of 'the subject information provisions' see para 545 note 7 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 Data Protection Act 1998 s 30(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(n)). For the meaning of 'data subject' see para 506 ante. As to the order that has been made see the Data Protection (Subject Access Modification) (Health) Order 2000, SI 2000/413.

4 For the meaning of 'data controller' see para 506 note 7 ante.

5 For these purposes, 'proprietor', in relation to a school in England or Wales, has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 60): Data Protection Act 1998 s 30(5). For the meaning of 'school' see note 7 infra.

6 'Teacher' includes head teacher: ibid s 70(1).

7 'School' has the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 81): Data Protection Act 1998 s 70(1).

8 'Pupil' means a registered pupil within the meaning of the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) para 16): Data Protection Act 1998 s 70(1).

9 Ibid s 30(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(n)). As to the order that has been made see the Data Protection (Subject Access Modification) (Education) Order 2000, SI 2000/414.

10 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

11 For the meaning of 'government department' see para 547 note 12 ante.

12 Data Protection Act 1998 s 30(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(n)). As to the order that has been made see the Data Protection (Subject Access Modification) (Social Work) Order 2000, SI 2000/415 (amended by SI 2002/2469; SI 2002/3220).

13 Data Protection Act 1998 s 30(4).

UPDATE

548 Health, education and social work

NOTE 3--See also *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934 (QB), [2009] PTSR 415.

NOTE 12--SI 2000/415 further amended: SI 2002/2469, SI 2005/467, SI 2005/3504.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/549. Regulatory activity.

549. Regulatory activity.

Personal data¹ processed² for the purposes of discharging regulatory functions is exempt from the subject information provisions³ in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of those functions⁴. A regulatory function is any relevant function⁵ which is designed:

- (1) for protecting members of the public against: (a) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; (b) financial loss due to the conduct of discharged or undischarged bankrupts; or (c) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity; or
- (2) for protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration; or
- (3) for protecting the property of charities from loss or misapplication; or
- (4) for the recovery of the property of charities; or
- (5) for securing the health, safety and welfare of persons at work; or
- (6) for protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work⁶.

Personal data processed for the purpose of discharging any function which:

- (i) is conferred by or under any enactment on the Parliamentary Commissioner for Administration, the Commission for Local Administration in England or the

Commission for Local Administration in Wales, the Health Service Commissioner for England or the Health Service Commissioner for Wales, or the Welsh Administration Ombudsman; and

(ii) is designed for protecting members of the public against maladministration by public bodies, failures in services provided by public bodies, or a failure of a public body to provide a service which it was a function of the body to provide,

is exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function⁷.

Personal data processed for the purpose of discharging any function which is conferred on the operator of the ombudsman scheme by or under Part XVI of the Financial Services and Markets Act 2000⁸ is exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of the function⁹.

Personal data processed for the purpose of discharging any function which is conferred by or under any enactment on the Office of Fair Trading¹⁰ and which is designed:

- (A) for protecting members of the public against conduct which may adversely affect their interests by persons carrying on a business¹¹; or
- (B) for regulating agreements or conduct which have as their object or effect the prevention, restriction or distortion of competition in connection with any commercial activity; or
- (C) for regulating conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market,

is exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function¹².

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For the meaning of 'the subject information provisions' see para 545 note 7 ante.

4 Data Protection Act 1998 s 31(1).

5 For these purposes, 'relevant function' means: (1) any function conferred on any person by or under any enactment; (2) any function of the Crown, a Minister of the Crown or a government department; or (3) any other function which is of a public nature and is exercised in the public interest: *ibid* s 31(3). For the meaning of 'enactment' see para 506 note 7 ante. For the meaning of 'Minister of the Crown' see para 509 note 13 ante. For the meaning of 'government department' see para 547 note 12 ante.

6 *Ibid* s 31(2).

7 *Ibid* s 31(4).

8 Ie the Financial Services and Markets Act 2000 Pt XVI (ss 225-234): see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575 et seq. As to the operator of the ombudsman scheme (ie the body established by the Financial Services Authority for the purposes of Pt XVI) see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 575 et seq.

9 Data Protection Act 1998 s 31(4A) (added by the Financial Services and Markets Act 2000 s 233).

10 As to the Office of Fair Trading see COMPETITION vol 18 (2009) PARA 6 et seq.

11 For the meaning of 'business' see para 538 note 5 ante.

12 Data Protection Act 1998 s 31(5) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 37).

UPDATE

549 Regulatory activity

TEXT AND NOTES--Personal data processed for the purpose of the function of considering a complaint under the Health and Social Care (Community Health and Standards) Act 2003 s 113(1) or (2) or 114(1) or (3), or the Children Act 1989 s 24D, 26, or 26ZB (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 926, 936 et seq), is also exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function: Data Protection Act 1998 s 31(6) (added by the 2003 Act s 119; amended by Education and Inspections Act 2006 Sch 14 para 32, Sch 18 Pt 5).

Personal data processed for the purpose of discharging any function which is conferred by or under the Local Government Act 2000 Pt 3 on (1) the monitoring officer of a relevant authority, (2) an ethical standards officer, or (3) the Public Services Ombudsman for Wales, are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function: see 1998 Act s 31(7), (8) (added by Local Government and Public Involvement in Health Act 2007 s 200).

TEXT AND NOTES 5, 6--Now head (2) for protecting charities or community interest companies against misconduct or mismanagement (whether by trustees, directors or other persons) in their administration; heads (3), (4) also refer to the property of community interest companies: 1998 Act s 31(2) (amended by Companies (Audit, Investigations and Community Enterprise) Act 2004 s 59(3)).

TEXT AND NOTE 7--1998 Act s 31(4) amended: Public Services Ombudsman (Wales) Act 2005 Sch 6 para 60, Sch 7.

NOTE 12--Personal data processed by a CPC enforcer for the purpose of discharging any function conferred on such a body by or under the CPC Regulation are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function: 1998 Act s 31(5A) (s 31(5A), (5B) added by SI 2006/3363). 'CPC enforcer' has the meaning given to it in the Enterprise Act 2002 s 213(5A) (see COMPETITION vol 18 (2009) PARA 342) but does not include the Office of Fair Trading; and 'CPC Regulation' has the meaning given to it in s 235A (see COMPETITION vol 18 (2009) PARA 342): 1998 Act s 31(5B)(a).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/550. Journalism, literature and art.

550. Journalism, literature and art.

Personal data which is processed¹ only for the special purposes² is exempt from certain provisions of the Data Protection Act 1998³ if: (1) the processing is undertaken with a view to the publication⁴ by any person of any journalistic, literary or artistic material; (2) the data controller⁵ reasonably believes that, having regard in particular to the special importance of the

public interest in freedom of expression, publication would be in the public interest; and (3) the data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes⁶. In considering for the purposes of head (2) above whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which is relevant to the publication in question, and is designated by the Lord Chancellor by order for these purposes⁷. Where at any time ('the relevant time') in any proceedings against a data controller⁸ the data controller claims, or it appears to the court, that any personal data to which the proceedings relate is being processed: (a) only for the special purposes; and (b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time 24 hours immediately before the relevant time, had not previously been published by the data controller, the court must stay the proceedings until either of the conditions mentioned below is met⁹. Those conditions are: (i) that a determination of the Information Commissioner¹⁰ with respect to the data in question takes effect; or (ii) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn¹¹.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante. For the meaning of 'the special purposes' see para 519 note 4 ante.

3 Ie the data protection principles except the seventh data protection principle (see para 507 et seq ante), the Data Protection Act 1998 s 7 (as amended) (see para 524 ante), s 10 (see para 526 ante), s 12 (see para 528 ante), s 12A (as added) (see para 529 ante), and s 14(1)-(3) (see para 531 ante): s 32(2) (temporarily amended by s 72, Sch 13 para 2(a) until 23 October 2007).

4 For the purposes of the Data Protection Act 1998, 'publish', in relation to journalistic, literary or artistic material, means make available to the public or any section of the public: s 32(6). See also *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224 (the exemption under the Data Protection Act 1998 s 32 continues to apply to processed data after publication because the information remains data as defined by the Act).

5 For the meaning of 'data controller' see para 506 note 7 ante.

6 Data Protection Act 1998 s 32(1). As to the interaction between freedom of expression and the law of confidence see para 418 ante.

7 Ibid s 32(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(o)). As to the order that has been made see the Data Protection (Designated Codes of Practice) (No 2) Order 2000, SI 2000/1864.

8 Ie under the Data Protection Act 1998 s 7(9) (see para 525 ante), s 10(4) (see para 526 ante), s 12(8) (see para 528 ante), s 12A(3) (as added) (see para 529 ante), s 14 (see para 531 ante) or by virtue of s 13 (see para 530 ante; and see *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] QB 633, [2003] 1 All ER 224).

9 Data Protection Act 1998 s 32(4) (temporarily amended by s 72, Sch 13 para 2(b) until 23 October 2007).

10 Ie under ibid s 45: see para 564 post. As to the Commissioner see para 518 ante.

11 Ibid s 32(5).

UPDATE

550 Journalism, literature and art

NOTE 4--*Campbell*, cited, reversed: [2004] UKHL 22, [2004] EMLR 247.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/551. Research, history and statistics.

551. Research, history and statistics.

For the purposes of the second data protection principle¹, the further processing² of personal data³ only for research purposes⁴ in compliance with the relevant conditions⁵ is not to be regarded as incompatible with the purposes for which it was obtained⁶. Personal data which is processed only for research purposes in compliance with the relevant conditions may, notwithstanding the fifth data protection principle⁷, be kept indefinitely⁸. Personal data which is processed only for research purposes is exempt from provisions relating to the right of access to personal data⁹ if: (1) it is processed in compliance with the relevant conditions; and (2) the results of the research or any resulting statistics are not made available in a form which identifies data subjects or any of them¹⁰. For these purposes¹¹, personal data is not to be treated as processed otherwise than for research purposes merely because the data is disclosed¹²: (a) to any person, for research purposes only; (b) to the data subject or a person acting on his behalf; (c) at the request, or with the consent, of the data subject or a person acting on his behalf; or (d) in circumstances in which the person making the disclosure has reasonable grounds for believing that the disclosure falls within head (a), (b) or (c) above¹³.

1 As to the data protection principles see para 507 et seq ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For the meanings of 'personal data' and 'data' see para 506 ante.

4 In the Data Protection Act 1998 s 33, 'research purposes' includes statistical or historical purposes: s 33(1).

5 In *ibid* s 33, 'the relevant conditions', in relation to any processing of personal data, means the conditions: (1) that the data is not processed to support measures or decisions with respect to particular individuals; and (2) that the data is not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject: s 33(1). For the meaning of 'data subject' see para 506 ante.

6 *Ibid* s 33(2).

7 See para 514 ante.

8 Data Protection Act 1998 s 33(3).

9 Ie exempt from *ibid* s 7 (as amended): see para 524 ante.

10 *Ibid* s 33(4).

11 Ie for the purposes of *ibid* s 33(2)-(4) (see the text and notes 1-10 *supra*).

12 For the meaning of 'disclosing' (of personal data) see para 506 ante.

13 Data Protection Act 1998 s 33(5).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/552. Exemptions applicable to certain manual data held by public authorities.

552. Exemptions applicable to certain manual data held by public authorities.

As from 30 November 2005, the Data Protection Act 1998¹ is to provide that personal data² which constitutes recorded information held by a public authority³ and falls within the scope of the Data Protection Act 1998⁴ is exempt from: (1) the first, second, third, fifth, seventh and eighth data protection principles⁵; and (2) the sixth data protection principle except so far as it relates to the rights conferred on data subjects⁶; and (3) the provisions of the Data Protection Act 1998 relating to the right to prevent processing likely to cause damage or distress⁷, the right to prevent processing for purposes of direct marketing⁸, and rights in relation to automated decision-taking⁹; and (4) the right to compensation¹⁰, except so far as it relates to damage caused by a contravention of the rights conferred on data subjects¹¹, or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention¹²; and (5) Part III of the Data Protection Act 1998¹³; and (6) the provisions relating to the unlawful obtaining of personal data¹⁴.

Personal data¹⁵ is also exempt from the remaining data protection principles and the remaining provisions of Part II of the Data Protection Act 1998¹⁶ if it relates to appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to: (a) service in any of the armed forces of the Crown¹⁷; (b) service in any office or employment under the Crown or under any public authority¹⁸; or (c) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action taken, in such matters is vested in Her Majesty, any Minister of the Crown, the National Assembly for Wales or any public authority¹⁹.

1 The Data Protection Act 1998 s 33A is added by the Freedom of Information Act 2000 s 70(1) as from 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 For the meaning of 'public authority' see para 506 note 5 ante.

4 Ie data which falls within the extended definition of 'data' in the Data Protection Act 1998 s 1(1)(e) (see para 506 ante): s 33A(1) (as added: see note 1 supra).

5 Ibid s 33A(1)(a) (as added: see note 1 supra). As to the data protection principles see para 507 et seq ante.

6 Ibid s 33A(1)(b) (as added: see note 1 supra). The rights referred to in the text are those conferred by s 7 (as amended) (see paras 524-525 ante) and s 14 (see para 531 ante).

7 Ie the right conferred by ibid s 10: see para 526 ante.

8 Ie the right conferred by ibid s 11: see para 527 ante.

9 Ibid s 33A(1)(c) (as added: see note 1 supra). The rights referred to in the text are those conferred by s 12: see para 528 ante.

10 Ie the right conferred by ibid s 13: see para 530 ante.

11 Ie the right conferred by ibid s 7 (as amended): see paras 524-525 ante.

12 Ibid s 33A(1)(d) (as added: see note 1 supra).

13 Ibid s 33A(1)(e) (as added: see note 1 supra). As to Pt III (ss 16-26) (as amended) see paras 537-544 ante.

14 Ibid s 33A(1)(f) (as added: see note 1 supra). The right referred to in the text is that conferred by s 55: see para 567 post.

15 See note 4 supra.

16 Ie the Data Protection Act 1998 Pt II (ss 7-15) (as amended): see paras 524-531 ante.

17 Ibid s 33A(2)(a) (as added: see note 1 supra).

18 Ibid s 33A(2)(b) (as added: see note 1 supra).

19 Ibid s 33A(2)(c) (as added: see note 1 supra). For the meaning of 'Minister of the Crown' see para 509 note 13 ante. As to the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

UPDATE

552 Exemptions applicable to certain manual data held by public authorities

TEXT AND NOTE 1--Now as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/553. Information available to the public by or under enactment.

553. Information available to the public by or under enactment.

Personal data¹ is exempt from: (1) the subject information provisions²; (2) the fourth data protection principle³ and certain provisions of the Data Protection Act 1998⁴; and (3) the non-disclosure provisions⁵, if the data consists of information which the data controller⁶ is obliged by or under any enactment⁷ other than an enactment contained in the Freedom of Information Act 2000 to make available to the public, whether by publishing⁸ it, by making it available for inspection, or otherwise and whether gratuitously or on payment of a fee⁹.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'the subject information provisions' see para 545 note 7 ante.

3 As to the data protection principles see para 507 et seq ante.

4 Ie the Data Protection Act 1998 s 12A (as added) (see para 529 ante), s 14(1)-(3) (see para 531 ante).

5 For the meaning of 'the non-disclosure provisions' see para 547 note 8 ante.

6 For the meaning of 'data controller' see para 506 note 7 ante.

7 For the meaning of 'enactment' see para 506 note 7 ante.

8 For the meaning of 'publish' (in relation to journalistic, literary or artistic material) see para 550 note 4 ante.

9 Data Protection Act 1998 s 34 (amended by the Freedom of Information Act 2000 s 72). Note that the availability of data under the Freedom of Information Act 2000 is disregarded for the purpose of exemption under the Data Protection Act 1998.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/554. Disclosures required by law or made in connection with legal proceedings etc.

554. Disclosures required by law or made in connection with legal proceedings etc.

Personal data¹ is exempt from the non-disclosure provisions² where the disclosure is required by or under any enactment³, by any rule of law or by the order of a court⁴. Personal data is exempt from the non-disclosure provisions where the disclosure is necessary:

- (1) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings); or
- (2) for the purpose of obtaining legal advice,

or is otherwise necessary for the purposes of establishing, exercising or defending legal rights⁵.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'the non-disclosure provisions' see para 547 note 8 ante.

3 For the meaning of 'enactment' see para 506 note 7 ante.

4 Data Protection Act 1998 s 35(1). This provision does not restrict the court's jurisdiction under the rule in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL, to order the delivery up of information which might assist in remedying a tort, and the exemption is not limited to the use of data by a data controller: *Totalise plc v Motley Fool Ltd* [2001] EMLR 750. As to delivery up ordered to protect a claimant's interests under the law of confidence see para 495 ante.

5 Data Protection Act 1998 s 35(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/555. Parliamentary privilege.

555. Parliamentary privilege.

As from 30 November 2005, the Data Protection Act 1998¹ is to provide that personal data² is exempt, if exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament³, from the following provisions of the Data Protection Act 1998⁴: (1) the first data protection principle⁵, except to the extent to which it requires compliance with the relevant conditions⁶; and (2) the second, third, fourth and fifth data protection principles⁷; and (3) the provisions conferring rights on data subjects⁸; and (4) the provisions conferring the right to prevent processing likely to cause damage or distress⁹ and the right to rectification, blocking, erasure and destruction¹⁰.

1 The Data Protection Act 1998 s 35A is added by the Freedom of Information Act 2000 s 73, Sch 6 para 2 as from on 30 November 2005 unless an earlier date is appointed: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)).

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 As to Parliamentary privilege see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

4 Data Protection Act 1998 s 35A (as added: see note 1 supra).

5 As to the data protection principles see para 507 et seq ante.

6 Data Protection Act 1998 s 35A(a) (as added: see note 1 supra). The conditions referred to in the text are those laid down in Sch 2 (see para 509 ante) and Sch 3 (see para 510 ante).

7 Ibid s 35A(b) (as added: see note 1 supra).

8 Ibid s 35A(c) (as added: see note 1 supra). The rights referred to in the text are those conferred by s 7 (as amended): see paras 524-525 ante.

9 Ie the right conferred by ibid s 10: see para 526 ante.

10 Ibid s 35A(d) (as added: see note 1 supra). The right referred to in the text is that conferred by s 14(1)-(3): see para 531 ante.

UPDATE

555 Parliamentary privilege

TEXT AND NOTE 1--Now as from 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/556. Other categories of exemption.

556. Other categories of exemption.

Personal data¹ processed² by an individual only for the purposes of that individual's personal, family or household affairs (including recreational purposes) is exempt from the data protection principles³, provisions concerning the rights of data subjects⁴ and others, and provisions concerning notification by data controllers⁵.

1 For the meanings of 'personal data' and 'data' see para 506 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 As to the data protection principles see para 507 et seq ante.

4 Ie the provisions of the Data Protection Act 1998 Pt II (ss 7-15) (as amended): see para 524 et seq ante.

5 Ibid s 36. Provision as to notification by data controllers is made by Pt III (ss 16-26) (as amended): see paras 537-544 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/ (6) EXEMPTIONS/557. Powers to make further exemptions by order.

557. Powers to make further exemptions by order.

The Lord Chancellor may by order exempt from the subject information provisions¹ personal data² consisting of information the disclosure of which is prohibited or restricted by or under any enactment³ if and to the extent that he considers it necessary for the safeguarding of the interests of the data subject⁴ or the rights and freedoms of any other individual that the prohibition or restriction ought to prevail over those provisions⁵. The Lord Chancellor may by order exempt from the non-disclosure provisions⁶ any disclosures of personal data made in

circumstances specified in the order, if he considers the exemption is necessary for the safeguarding of the interests of the data subject or the rights and freedoms of any other individual⁷.

Provision is made relating to further miscellaneous exemptions⁸ and transitional relief⁹.

1 For the meaning of 'the subject information provisions' see para 545 note 7 ante.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 For the meaning of 'enactment' see para 506 note 7 ante.

4 For the meaning of 'data subject' see para 506 ante.

5 Data Protection Act 1998 s 38(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(p)). Provision has been made in relation to the Human Fertilisation and Embryology Act 1990, the Adoption Act 1976, the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, SI 2001/3455, and the Education (Special Educational Needs) (Wales) Regulations 2002, SI 2002/152: see the Data Protection (Miscellaneous Subject Access Exemptions) Order 2000, SI 2000/419 (amended by SI 2000/1865). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

6 For the meaning of 'the non-disclosure provisions' see para 547 note 8 ante.

7 Data Protection Act 1998 s 38(2) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, Sch 2 Pt 1 para 6(1)(p)).

8 See the Data Protection Act 1998 s 37, Sch 7 (amended by the Northern Ireland Act 1998 s 99, Sch 13 para 21; the Freedom of Information Act 2000 s 73, Sch 6 paras 6-7; and the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500, art 8, Sch 2 Pt 1 para 6(1)(dd)). The miscellaneous exemptions include exemptions relating to the armed forces; judicial appointments and honours; personal data processed for the purposes of, or in connection with, a corporate finance service; self-incrimination and legal professional privilege: see the Data Protection Act 1998 Sch 7 (as so amended). See also the Data Protection (Corporate Finance Exemption) Order 2000, SI 2000/184; and the Data Protection (Crown Appointments) Order 2000, SI 2000/416.

9 See the Data Protection Act 1998 s 39, Sch 8.

UPDATE

557 Powers to make further exemptions by order

NOTE 5--Reference to Adoption Act 1976 is now to Adoption and Children Act 2002: SI 2000/419 (amended by SI 2005/3504).

SI 2000/419 further amended: SI 2009/1892, SI 2010/986.

NOTE 8--Data Protection Act 1998 Sch 7 further amended: Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007, SI 2007/126.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/A. IN GENERAL/558. Service of notices by the Information Commissioner.

(7) ENFORCEMENT

(i) Notices, etc

A. IN GENERAL

558. Service of notices by the Information Commissioner.

Any notice authorised or required by the Data Protection Act 1998 to be served on or given to any person by the Information Commissioner¹ may:

- (1) if that person is an individual, be served on him: (a) by delivering it to him; or (b) by sending it to him by post addressed to him at his usual or last-known place of residence or business²; or (c) by leaving it for him at that place;
- (2) if that person is a body corporate or unincorporate, be served on that body: (a) by sending it by post to the proper officer³ of the body at its principal office⁴; or (b) by addressing it to the proper officer of the body and leaving it at that office⁵.

The provisions described above are without prejudice to any other lawful method of serving or giving a notice⁶.

1 As to the Commissioner see para 518 ante.

2 For the meaning of 'business' see para 538 note 5 ante.

3 For these purposes, 'proper officer', in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs: Data Protection Act 1998 s 65(2).

4 For these purposes, 'principal office', in relation to a registered company, means its registered office: *ibid* s 65(2). For the meaning of 'registered company' see para 538 note 5 ante.

5 *Ibid* s 65(1).

6 *Ibid* s 65(3).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/B. ENFORCEMENT NOTICES/559. Enforcement notices.

B. ENFORCEMENT NOTICES

559. Enforcement notices.

If the Information Commissioner¹ is satisfied that a data controller² has contravened or is contravening any of the data protection principles³, the Commissioner may serve him with a notice (an 'enforcement notice') requiring him, for complying with the principle or principles in question, to do either or both of the following: (1) to take within such time as may be specified in the notice, or to refrain from taking after such time as may be so specified, such steps as are so specified; or (2) to refrain from processing⁴ any personal data⁵, or any personal data of a description specified in the notice, or to refrain from processing it for a purpose so specified or in a manner so specified, after such time as may be so specified⁶. In deciding whether to serve an enforcement notice, the Commissioner must consider whether the contravention has caused or is likely to cause any person damage or distress⁷. An enforcement notice in respect of a contravention of the fourth data protection principle⁸, which requires the data controller to

rectify, block, erase or destroy any inaccurate⁹ data, may also require the data controller to rectify, block, erase or destroy any other data held by him and containing an expression of opinion which appears to the Commissioner to be based on the inaccurate data¹⁰. An enforcement notice in respect of a contravention of the fourth data protection principle, in the case of data which accurately records information received or obtained by the data controller from the data subject¹¹ or a third party¹², may require the data controller either: (a) to rectify, block, erase or destroy any inaccurate data and any other data held by him and containing an expression of opinion¹³; or (b) to take such steps as are specified in the notice for securing compliance with requirements¹⁴ and, if the Commissioner thinks fit, for supplementing the data with such statement of the true facts relating to the matters dealt with by the data as the Commissioner may approve¹⁵. Where: (i) an enforcement notice requires the data controller to rectify, block, erase or destroy any personal data; or (ii) the Commissioner is satisfied that personal data which has been rectified, blocked, erased or destroyed had been processed in contravention of any of the data protection principles, an enforcement notice may, if reasonably practicable, require the data controller to notify third parties to whom the data has been disclosed¹⁶ of the rectification, blocking, erasure or destruction; and in determining whether it is reasonably practicable to require such notification regard must be had, in particular, to the number of persons who would have to be notified¹⁷. An enforcement notice must contain: (A) a statement of the data protection principle or principles which the Commissioner is satisfied have been or are being contravened and his reasons for reaching that conclusion; and (B) particulars of the rights of appeal¹⁸. An enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal¹⁹. Notification regulations²⁰ may make provision as to the effect of the service of an enforcement notice on any entry in the register²¹ which relates to the person on whom the notice is served²².

1 As to the Commissioner see para 518 ante.

2 For the meaning of 'data controller' see para 506 note 7 ante.

3 As to the data protection principles see para 507 et seq ante.

4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

5 For the meanings of 'personal data' and 'data' see para 506 ante.

6 Data Protection Act 1998 s 40(1). Section 40 has effect subject to s 46(1) (see para 565 post): s 40(10).

7 Ibid s 40(2).

8 See para 513 ante.

9 For the meaning of 'inaccurate' (in relation to data) see para 513 note 2 ante.

10 Data Protection Act 1998 s 40(3).

11 For the meaning of 'data subject' see para 506 ante.

12 For the meaning of 'third party' see para 531 note 5 ante.

13 Ie as mentioned in the Data Protection Act 1998 s 40(3) (see the text and note 10 supra).

14 Ie the requirements specified in ibid Sch 1 Pt II para 7: see para 513 ante.

15 Ibid s 40(4).

16 For the meaning of 'disclosing' (of personal data) see para 506 ante.

17 Data Protection Act 1998 s 40(5).

18 Ibid s 40(6). The rights referred to in the text are those conferred by s 48: see para 568 post.

19 Ibid s 40(7). If by reason of special circumstances the Commissioner considers that an enforcement notice should be complied with as a matter of urgency he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event s 40(7) does not apply but the notice may not require the provisions of the notice to be complied with before the end of the period of seven days beginning with the day on which the notice is served: s 40(8).

20 Ie as defined by ibid s 16(2): see para 538 ante.

21 Ie the register maintained under ibid s 19: see para 539 ante.

22 Ibid s 40(9).

UPDATE

559 Enforcement notices

NOTES--1998 Act s 40 modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/B. ENFORCEMENT NOTICES/560. Cancellation or variation of enforcement notices.

560. Cancellation or variation of enforcement notices.

If the Information Commissioner¹ considers that all or any of the provisions of an enforcement notice² need not be complied with in order to ensure compliance with the data protection principle³ or principles to which it relates, he may cancel or vary the notice by written notice to the person on whom it was served⁴. A person on whom an enforcement notice has been served may, at any time after the expiry of the period during which an appeal can be brought against that notice, apply in writing to the Commissioner for the cancellation or variation of that notice on the ground that, by reason of a change of circumstances, all or any of the provisions of that notice need not be complied with in order to ensure compliance with the data protection principle or principles to which that notice relates⁵.

1 As to the Commissioner see para 518 ante.

2 As to enforcement notices see para 559 ante.

3 As to the data protection principles see para 507 et seq ante.

4 Data Protection Act 1998 s 41(1).

5 Ibid s 41(2).

UPDATE

560 Cancellation or variation of enforcement notices

NOTES--1998 Act s 41 modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/C. REQUEST FOR ASSESSMENT/561. Request for assessment.

C. REQUEST FOR ASSESSMENT

561. Request for assessment.

A request may be made to the Information Commissioner¹ by or on behalf of any person who is, or believes himself to be, directly affected by any processing² of personal data³ for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of the Data Protection Act 1998⁴. On receiving such a request, the Commissioner must make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request, and to enable him to identify the processing in question⁵. Where the Commissioner has received a request he must notify the person who made the request: (1) whether he has made an assessment as a result of the request; and (2) to the extent that he considers appropriate, having regard in particular to any exemption⁶ applying in relation to the personal data concerned, of any view formed or action taken as a result of the request⁷.

1 As to the Commissioner see para 518 ante.

2 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

3 For the meanings of 'personal data' and 'data' see para 506 ante.

4 Data Protection Act 1998 s 42(1).

5 Ibid s 42(2). The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include: (1) the extent to which the request appears to him to raise a matter of substance; and (2) any undue delay in making the request; and (3) whether or not the person making the request is entitled to make an application under s 7 (as amended) (see para 524 ante) in respect of the personal data in question: s 42(3).

6 Ie the exemption from ibid s 7 (as amended): see para 524 ante.

7 Ibid s 42(4).

UPDATE

561 Request for assessment

NOTES--1998 Act s 42 omitted for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/D. INFORMATION NOTICES/562. Information notices.

D. INFORMATION NOTICES

562. Information notices.

If the Information Commissioner¹: (1) has received a request² in respect of any processing³ of personal data⁴; or (2) reasonably requires any information for the purpose of determining whether the data controller⁵ has complied or is complying with the data protection principles⁶, he may serve the data controller with a notice (an 'information notice') requiring the data controller, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the request or to compliance with the principles as is so specified⁷. An information notice must contain: (a) in a case falling within head (1) above, a statement that the Commissioner has received a request⁸ in relation to the specified processing; or (b) in a case falling within head (2) above, a statement that the Commissioner regards the specified information as relevant for the purpose of determining whether the data controller has complied, or is complying, with the data protection principles and his reasons for regarding it as relevant for that purpose⁹. An information notice must also contain particulars of the rights of appeal¹⁰. The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal¹¹. A person is not required to furnish the Commissioner with any information in respect of: (i) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under the Data Protection Act 1998; or (ii) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of the Data Protection Act 1998 (including proceedings before the Information Tribunal¹²) and for the purposes of such proceedings¹³. A person is not required to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence other than an offence under the Data Protection Act 1998, expose him to proceedings for that offence¹⁴. The Commissioner may cancel an information notice by written notice to the person on whom it was served¹⁵.

1 As to the Commissioner see para 518 ante.

2 Ie a request under the Data Protection Act 1998 s 42: see para 561 ante.

3 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

4 For the meanings of 'personal data' and 'data' see para 506 ante.

5 For the meaning of 'data controller' see para 506 note 7 ante.

6 As to the data protection principles see para 507 et seq ante.

7 Data Protection Act 1998 s 43(1). Section 43 has effect subject to s 46(3) (see para 565 post): s 43(10).

8 Ie under ibid s 42: see para 561 ante.

9 Ibid s 43(2).

10 Ibid s 43(3). The rights referred to in the text are those conferred by s 48: see para 568 post.

11 Ibid s 43(4). If by reason of special circumstances the Commissioner considers that the information is required as a matter of urgency, he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event s 43(4) does not apply, but the notice must not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served: s 43(5).

12 As to the Tribunal see para 521 ante.

13 Data Protection Act 1998 s 43(6). For the purposes of s 43(6), references to the client of a professional legal adviser include references to any person representing such a client: s 43(7).

14 Ibid s 43(8).

15 Ibid s 43(9).

UPDATE

562 Information notices

NOTES--1998 Act s 43 modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/D. INFORMATION NOTICES/563. Special information notices.

563. Special information notices.

If the Information Commissioner¹: (1) has received a request² in respect of any processing³ of personal data⁴; or (2) has reasonable grounds for suspecting that, in a case in which proceedings have been stayed⁵, the personal data to which the proceedings relate is not being processed only for the special purposes⁶ or is not being processed with a view to the publication⁷ by any person of any journalistic, literary or artistic material which has not previously been published by the data controller⁸, he may serve the data controller with a notice (a 'special information notice') requiring the data controller, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information as is so specified for the purpose described below⁹. That purpose is the purpose of ascertaining: (a) whether the personal data is being processed only for the special purposes; or (b) whether it is being processed with a view to the publication by any person of any journalistic, literary or artistic material which has not previously been published by the data controller¹⁰. A special information notice must contain: (i) in a case falling within head (1) above, a statement that the Commissioner has received a request¹¹ in relation to the specified processing; or (ii) in a case falling within head (2) above, a statement of the Commissioner's grounds for suspecting that the personal data is not being processed as mentioned in that provision¹². A special information notice must also contain particulars of the rights of appeal¹³. The time specified in a special information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal¹⁴. A person is not required to furnish the Commissioner with any information in respect of: (A) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under the Data Protection Act 1998; or (B) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of the Data Protection Act 1998 (including proceedings before the Information Tribunal¹⁵) and for the purposes of such proceedings¹⁶. A person is not required to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence other than an offence under the Data Protection Act 1998, expose him to proceedings for that

offence¹⁷. The Commissioner may cancel a special information notice by written notice to the person on whom it was served¹⁸.

- 1 As to the Commissioner see para 518 ante.
- 2 Ie under the Data Protection Act 1998 s 42 (see para 561 ante): s 44(1)(a).
- 3 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 4 For the meanings of 'personal data' and 'data' see para 506 ante.
- 5 Ie under the Data Protection Act 1998 s 32 (see para 550 ante): s 44(1)(b).
- 6 For the meaning of 'the special purposes' see para 519 note 4 ante.
- 7 For the meaning of 'publish' (in relation to journalistic, literary or artistic material) see para 550 note 4 ante.
- 8 For the meaning of 'data controller' see para 506 note 7 ante.
- 9 Data Protection Act 1998 s 44(1).
- 10 Ibid s 44(2).
- 11 Ie under ibid s 42: see para 561 ante.
- 12 Ibid s 44(3)(b).
- 13 Ibid s 44(4). The rights referred to in the text are those conferred by s 48: see para 568 post.
- 14 Ibid s 44(5). If by reason of special circumstances the Commissioner considers that the information is required as a matter of urgency, he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event s 44(5) does not apply, but the notice must not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served: s 44(6).
- 15 As to the Tribunal see para 521 ante.
- 16 Data Protection Act 1998 s 44(7). For the purposes of s 44(7), references to the client of a professional legal adviser include references to any person representing such a client: s 44(8).
- 17 Ibid s 44(9).
- 18 Ibid s 44(10).

UPDATE

563 Special information notices

NOTES--1998 Act s 44 omitted for purposes of Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/E. DETERMINATION AS TO THE SPECIAL PURPOSES/564. Determination by the Information Commissioner as to the special purposes.

E. DETERMINATION AS TO THE SPECIAL PURPOSES

564. Determination by the Information Commissioner as to the special purposes.

Where at any time it appears to the Information Commissioner¹ (whether as a result of the service of a special information notice² or otherwise) that any personal data³ is not being processed⁴ only for the special purposes⁵, or is not being processed with a view to the publication⁶ by any person of any journalistic, literary or artistic material which has not previously been published by the data controller⁷, he may make a determination in writing to that effect⁸. Notice of the determination must be given to the data controller; and the notice must contain particulars of the right of appeal⁹. A determination does not take effect until the end of the period within which an appeal can be brought and, where an appeal is brought, does not take effect pending the determination or withdrawal of the appeal¹⁰.

- 1 As to the Commissioner see para 518 ante.
- 2 As to special information notices see para 563 ante.
- 3 For the meanings of 'personal data' and 'data' see para 506 ante.
- 4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 5 For the meaning of 'the special purposes' see para 519 note 4 ante.
- 6 For the meaning of 'publish' (in relation to journalistic, literary or artistic material) see para 550 note 4 ante.
- 7 For the meaning of 'data controller' see para 506 note 7 ante.
- 8 Data Protection Act 1998 s 45(1).
- 9 Ibid s 45(2). The right referred to in the text is that conferred by s 48: see para 568 post.
- 10 Ibid s 45(3).

UPDATE

564 Determination by the Information Commissioner as to the special purposes

NOTES--1998 Act s 45 omitted for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(i) Notices, etc/E. DETERMINATION AS TO THE SPECIAL PURPOSES/565. Restriction on enforcement in case of processing for the special purposes.

565. Restriction on enforcement in case of processing for the special purposes.

The Information Commissioner¹ may not at any time serve an enforcement notice² on a data controller³ with respect to the processing⁴ of personal data⁵ for the special purposes⁶ unless: (1) a determination⁷ with respect to the data has taken effect; and (2) the court has granted permission for the notice to be served⁸. The court must not grant permission for the purposes of

head (2) above unless it is satisfied: (a) that the Commissioner has reason to suspect a contravention of the data protection principles⁹ which is of substantial public importance; and (b) except where the case is one of urgency, that the data controller has been given notice, in accordance with rules of court, of the application for permission¹⁰. The Commissioner may not serve an information notice¹¹ on a data controller with respect to the processing of personal data for the special purposes unless a determination¹² with respect to the data has taken effect¹³.

- 1 As to the Commissioner see para 518 ante.
- 2 As to enforcement notices see para 559 ante.
- 3 For the meaning of 'data controller' see para 506 note 7 ante.
- 4 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 5 For the meanings of 'personal data' and 'data' see para 506 ante.
- 6 For the meaning of 'the special purposes' see para 519 note 4 ante.
- 7 Ie a determination under the Data Protection Act 1998 s 45(1): see para 564 ante.
- 8 Ibid s 46(1).
- 9 As to the data protection principles see para 507 et seq ante.
- 10 Data Protection Act 1998 s 46(2).
- 11 As to information notices see para 562 ante.
- 12 Ie a determination under the Data Protection Act 1998 s 45(1): see para 564 ante.
- 13 Ibid s 46(3).

UPDATE

565 Restriction on enforcement in case of processing for the special purposes

NOTES--1998 Act s 46 omitted for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(ii) Offences/566. Offences.

(ii) Offences

566. Offences.

The following offences are created by the Data Protection Act 1998:

- (1) a data controller¹ is guilty of an offence if personal data² is processed³ and he does not have an entry in respect of him included (or treated by notification regulations⁴ as being so included) in the register⁵ maintained by the Information Commissioner⁶;

- (2) a person who fails to comply with the duty imposed by notification regulations⁷ is guilty of an offence⁸;
- (3) a data controller is guilty of an offence if assessable processing⁹ in respect of which a notification¹⁰ has been given to the Commissioner is carried on before the statutory time limit has expired or (otherwise) before the data controller has received the required notice¹¹ from the Commissioner in respect of the processing¹²;
- (4) a data controller is guilty of an offence if he has not given the required notification¹³ and he fails to comply with the duty to make relevant particulars available to a person where personal data of a particular description¹⁴ is processed¹⁵;
- (5) a person who fails to comply with an enforcement notice¹⁶, an information notice¹⁷ or a special information notice¹⁸ is guilty of an offence¹⁹;
- (6) a person who, in purported compliance with an information notice or a special information notice, knowingly or recklessly makes a statement which is false in a material respect is guilty of an offence²⁰;
- (7) a person who knowingly or recklessly, and without the consent of the data controller, obtains or discloses personal data or the information contained in personal data is guilty of an offence²¹;
- (8) a person who knowingly or recklessly, and without the consent of the data controller procures the disclosure to another person of the information contained in personal data is guilty of an offence²²;
- (9) a person who sells personal data which he has obtained in contravention of head (7) or head (8) above is guilty of an offence²³;
- (10) a person who offers to sell personal data which has been obtained or is subsequently obtained as mentioned in head (9) above is guilty of an offence²⁴;
- (11) a person who requires another person or a third party to supply him with or to produce to him a relevant record²⁵ in connection with the other person's recruitment or continued employment or with any contract for the other person's provision of services to him is guilty of an offence²⁶;
- (12) a person who, as a condition of providing or offering to provide any goods, facilities or services to another person, requires that other person or a third party to supply him with a relevant record or to produce a relevant record to him is guilty of an offence²⁷;
- (13) a person who is or has been the Commissioner or an agent of the Commissioner or a member of his staff who knowingly or recklessly discloses information without lawful authority is guilty of an offence²⁸;
- (14) a person is guilty of an offence if he either intentionally obstructs a person in the execution of a warrant²⁹ so issued or fails without reasonable excuse to give any person executing such a warrant such assistance as he may reasonably require³⁰.

No proceedings for an offence under the Data Protection Act 1998 may be instituted in England or Wales, except by the Information Commissioner or by or with the consent of the Director of Public Prosecutions³¹. A person guilty of an offence under any provision of the Act³² is liable: (a) on summary conviction, to a fine not exceeding the statutory maximum; or (b) on conviction on indictment, to a fine³³. A person guilty of an offence under head (14) above is liable on summary conviction to a fine not exceeding level 5 on the standard scale³⁴. Where an offence under the Data Protection Act 1998 has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly³⁵. The court by or before which a person is convicted of an offence under heads (1) to (3), (5) and (7) to (12)³⁶ above may order any document or other material used in connection with the processing

of personal data and appearing to the court to be connected with the commission of the offence to be forfeited, destroyed or erased³⁷.

- 1 For the meaning of 'data controller' see para 506 note 7 ante.
- 2 For the meanings of 'personal data' and 'data' see para 506 ante.
- 3 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.
- 4 As to the notification regulations see para 537 ante.
- 5 As to the register of notifications see para 539 ante.
- 6 Data Protection Act 1998 s 21(1). See para 537 ante. As to the Commissioner see para 518 ante.
- 7 Ie the regulations made by virtue of *ibid* s 20(1): see para 540 ante.
- 8 See *ibid* s 21(2); and para 540 ante. It is a defence for a person charged with an offence under s 21(2) to show that he exercised all due diligence to comply with the duty: s 21(3).
- 9 For the meaning of 'assessable processing' see para 541 note 5 ante.
- 10 Ie under the Data Protection Act 1998 s 18 (see para 538 ante) or s 20 (see para 540 ante): see para 541 ante.
- 11 See para 541 ante.
- 12 See the Data Protection Act 1998 s 22(6); and para 541 ante.
- 13 Ie the notification of relevant particulars required under *ibid* s 18 (see para 538 ante). See para 542 ante.
- 14 Ie processing to which *ibid* s 17(1) does not apply: see para 537 ante.
- 15 See *ibid* s 24(4); and para 542 ante.
- 16 As to enforcement notices see para 559 ante.
- 17 As to information notices see para 562 ante.
- 18 As to special information notices see para 563 ante.
- 19 Data Protection Act 1998 s 47(1). It is a defence for a person charged with an offence under s 47(1) to prove that he exercised all due diligence to comply with the notice in question: s 47(3).
- 20 *Ibid* s 47(2). As to compliance with an information notice or a special information notice see paras 562-563 ante.
- 21 See *ibid* s 55(3); and para 567 post.
- 22 See *ibid* s 55(3); and para 567 post.
- 23 See *ibid* s 55(4); and para 567 post.
- 24 See *ibid* s 55(5); and para 567 post.
- 25 For the meaning of 'relevant record' see para 535 note 4 ante.
- 26 See the Data Protection Act 1998 s 56(1); and para 535 ante.
- 27 See *ibid* s 56(2); and para 535 ante.
- 28 See *ibid* s 59(3); and para 523 ante.
- 29 As to the issue and execution of such a warrant see para 575 post.
- 30 See the Data Protection Act 1998 Sch 9 para 12; and para 575 post.

31 Ibid s 60(1).

32 ie other than under *ibid* Sch 9 para 12 (see para 575 post).

33 *Ibid* s 60(2).

34 *Ibid* s 60(3). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

35 Data Protection Act 1998 s 61(1). Where the affairs of a body corporate are managed by its members, s 61(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 61(2).

36 *Ibid* s 60(4). Section 60(4) applies in relation to offences under head (2) in the text relating to processing which is assessable processing for the purposes of s 22 (see para 537 ante) and in relation to offences under head (5) in the text relating to an enforcement notice: s 60(4).

37 *Ibid* s 60(4). The court must not make an order under s 60(4) in relation to any material where a person (other than the offender) claiming to be the owner of or otherwise interested in the material applies to be heard by the court, unless an opportunity is given to him to show cause why the order should not be made: s 60(5).

UPDATE

566 Offences

NOTES--1998 Act s 47 modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(ii) Offences/567. Unlawful obtaining etc of personal data.

567. Unlawful obtaining etc of personal data.

A person must not knowingly or recklessly, without the consent of the data controller¹: (1) obtain or disclose personal data² or the information contained in personal data; or (2) procure the disclosure to another person of the information contained in personal data³. This does not apply to a person who shows: (a) that the obtaining, disclosing or procuring: (i) was necessary for the purpose of preventing or detecting crime; or (ii) was required or authorised by or under any enactment⁴, by any rule of law or by the order of a court; or (b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person; or (c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it; or (d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest⁵.

1 For the meaning of 'data controller' see para 506 note 7 ante.

2 For the meanings of 'personal data', 'data', and 'disclosing' and 'obtaining' (of personal data) see para 506 ante. References in the Data Protection Act 1998 s 55 to personal data do not include references to personal data which by virtue of s 28 (see para 546 ante) or s 33A (as added) (see para 552 ante) is exempt from s 55: s 55(8) (amended by the Freedom of Information Act 2000 s 70(2) as from 30 November 2005 unless an earlier date is appointed: see the Freedom of Information Act 2000 s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))).

3 Data Protection Act 1998 s 55(1). A person who contravenes s 55(1) is guilty of an offence: s 55(3). A person who sells personal data is guilty of an offence if he has obtained the data in contravention of s 55(1): s 55(4). A person who offers to sell personal data is guilty of an offence if: (1) he has obtained the data in contravention of s 55(1); or (2) he subsequently obtains the data in contravention of that provision: s 55(5). For the purposes of s 55(5), an advertisement indicating that personal data is or may be for sale is an offer to sell the data: s 55(6). Section 1(2) (see para 506 ante) does not apply for the purposes of s 55; and for the purposes of s 55(4)-(6), 'personal data' includes information extracted from personal data: s 55(7).

4 For the meaning of 'enactment' see para 506 note 7 ante.

5 Data Protection Act 1998 s 55(2).

UPDATE

567 Unlawful obtaining etc of personal data

TEXT AND NOTES--The Secretary of State may by order provide for a person who is guilty of an offence under the Data Protection Act 1998 s 55 to be liable (1) on summary conviction, to imprisonment for a term not exceeding the specified period or to a fine not exceeding the statutory maximum or to both, (2) on conviction on indictment, to imprisonment for a term not exceeding the specified period or to a fine or to both: see Criminal Justice and Immigration Act 2008 s 77.

NOTE 2--Now as from 1 January 2005: SI 2004/3122.

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(iii) Appeals

A. APPEALS OTHER THAN IN RELATION TO NATIONAL SECURITY CERTIFICATES

568. Appeals to the Tribunal.

A person may appeal to the Information Tribunal¹ against:

- (1) an enforcement notice², an information notice³ or a special information notice⁴ which has been served on him⁵; or
- (2) the refusal of an application⁶ for cancellation or variation of an enforcement notice which has been served upon him⁷.

Where an enforcement notice, an information notice or a special information notice contains a statement by the Information Commissioner⁸ then, whether or not the person appeals against the notice, he may appeal against⁹:

- (a) the Commissioner's decision to include the statement in the notice¹⁰; or
- (b) the effect of the inclusion of the statement as respects any part of the notice¹¹.

A data controller¹² in respect of whom a determination has been made¹³ may appeal to the Tribunal against the determination¹⁴.

Provision has been made for rules of procedure in relation to such appeals and the proceedings of the Tribunal in respect of any such appeal¹⁵.

An appeal¹⁶ is brought by a written notice of appeal served on the Tribunal within 28 days¹⁷ of the date on which the notice relating to the disputed decision¹⁸ was served on or given to the appellant¹⁹.

Upon receipt of a notice of appeal, the proper officer must send an acknowledgement of the service of a notice of appeal to the appellant²⁰, and a copy of the notice of appeal to the Commissioner²¹, unless the appeal is under head (a) or head (b) above²², in which case the proper officer must send a copy of the notice of appeal to the Commissioner only if the Tribunal is of the opinion that the interests of justice require the Commissioner to assist it by giving evidence or being heard on any matter relating to the appeal²³.

In reply, the Commissioner must send to the Tribunal a copy of the notice relating to the disputed decision²⁴, and he must send to the Tribunal and the appellant a written reply acknowledging service upon him of the notice of appeal, and stating whether or not he intends to oppose the appeal and, if so, the grounds upon which he relies in opposing the appeal²⁵. This must be done, where the Commissioner receives a copy of a notice of appeal other than under head (a) or head (b) above²⁶, within 21 days of the date of that receipt²⁷; and, where the Commissioner receives a copy of a notice of appeal under head (a) or head (b) above²⁸, within such time (not exceeding 21 days from the date of that receipt) as the Tribunal may allow²⁹. Where the appellant's notice of appeal has stated that he is not likely to wish a hearing to be held, the Commissioner must in his reply inform the Tribunal and the appellant whether he considers that a hearing is likely to be desirable³⁰. Where the appeal is under head (1) above in relation to an information notice, the Commissioner may include in his reply a statement of representations as to why it might be necessary in the interests of justice for the appeal to be heard and determined otherwise than by the chairman sitting alone³¹.

With the permission of the Tribunal, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal³². Upon receipt of a copy of an amended notice of appeal or amended grounds of appeal³³, the Commissioner may amend his reply to the notice of appeal, and must send the amended reply to the Tribunal and the appellant within such time constraints as operate in the case of an unamended notice of appeal³⁴. The Commissioner may in any case, with the permission of the Tribunal, amend his reply to the notice of appeal, and must send the amended reply to the Tribunal and the appellant³⁵.

Other than where the appeal is made under head (a) or head (b) above³⁶, the Commissioner may include in his reply³⁷, where he is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of appeal, a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out³⁸. Such an application may be heard as a preliminary issue or at the beginning of the hearing of the substantive appeal³⁹.

The appellant may at any time withdraw his appeal by sending to the Tribunal a notice of withdrawal signed by him or on his behalf, and the proper officer must send a copy of that notice to the Commissioner⁴⁰. Such a notice, if sent by post in a registered letter or by the recorded delivery service to the proper officer of the Tribunal⁴¹, has effect on the date on which it is received for dispatch by the postal operator concerned⁴².

Where an appeal is withdrawn in this way a fresh appeal may not be brought by the appellant in relation to the same disputed decision except with the permission of the Tribunal⁴³.

For the purpose of determining an appeal, the Tribunal may make an order requiring the occupier of any premises to permit the Tribunal to enter at a specified time and inspect, examine, operate or test any equipment on those premises used or intended to be used in connection with the processing of personal data, and to inspect, examine or test any documents or other material on those premises connected with the processing of personal data⁴⁴, although documents or other material which the appellant could not be compelled to produce on the trial of an action in that part of the United Kingdom where the appeal is to be determined are immune from such inspection, examination or testing⁴⁵.

1 As to the Tribunal see para 521 ante.

2 As to enforcement notices see para 559 ante.

3 As to information notices see para 562 ante.

4 As to special information notices see para 563 ante.

5 Data Protection Act 1998 s 48(1). A public authority may also appeal to the Tribunal against an information notice or enforcement notice served by the Information Commissioner under the Freedom of Information Act 2000: see s 57(2).

6 Ie an application under the Data Protection Act 1998 s 41(2): see para 560 ante.

7 Ibid s 48(2).

8 Ie a statement included in accordance with ibid s 40(8) (see para 559 ante), s 43(5) (see para 562 ante) or s 44(6) (see para 563 ante). As to the Commissioner see para 518 ante. As to the service of notices etc by the Commissioner see para 558 ante.

9 Ibid s 48(3).

10 Ibid s 48(3)(a).

11 Ibid s 48(3)(b).

12 For the meaning of 'data controller' see para 506 note 7 ante.

13 Ie a determination made under the Data Protection Act 1998 s 45: see para 564 ante.

14 Ibid s 48(4).

15 See ibid s 48(5), Sch 6 para 7 (amended by the Freedom of Information Act 2000 s 61(1), Sch 4 para 4; and the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 6(1)(cc)). See the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189 (amended by SI 2001/1149; SI 2002/2722); the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (amended by SI 2001/1149); and the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731 (amended by SI 2001/1149). As to appeals to the Tribunal in respect of matters which involve national security see paras 572-574 post. The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

The provisions of the Data Protection Act 1998 Sch 6 also have effect (so far as applicable) in relation to appeals against notices served under the Freedom of Information Act 2000 Pt IV (ss 50-56): s 61(2).

16 For these purposes, 'appeal' means an appeal under the Data Protection Act 1998 s 48: Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 2(2).

17 The Tribunal may accept later service of a notice of appeal if it is of the opinion that, by reason of special circumstances, it is just and right to do so: ibid r 4(2). If a written notice of appeal is sent by post in a registered letter or by the recorded delivery service to the proper officer of the Tribunal, it is treated as having been served on the date on which it is received for dispatch by the postal operator (within the meaning of the Postal Services Act 2000: see POST OFFICE) concerned: Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 4(3) (amended by SI 2001/1149). Any reference in any legislation or legal document to

'Registered Post' or 'the Registered Service' must be taken to be a reference to 'Special Delivery', which is the brand name used to denote the type of service previously provided by the registered post service, as it is the same service in all material particulars: see the Post Office Inland Letter Post Scheme 1989 para 3(1). As to Special Delivery and the Recorded Delivery Service see POST OFFICE vol 36(2) (Reissue) paras 116-119. Any notice or other document required or authorised by the rules to be served on or sent to any person or authority may be sent by post in a registered letter or by the recorded delivery service: (1) in the case of the Tribunal, to the proper officer of the Tribunal; (2) in the case of the Commissioner, to him at his office; (3) in the case of an appellant, to him at his address for service under the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189; and (4) in the case of an occupier who is subject to an order requiring him to permit the Tribunal to enter his premises (see r 12; and the text to notes 44-45 *infra*), to him at the premises in question: r 27(1). An appellant may at any time by notice to the Tribunal change his address for service: r 27(2). 'Proper officer' means an officer or member of staff provided to the Tribunal and appointed by the chairman to perform the duties of a proper officer: r 2(2).

18 For these purposes, 'disputed decision' means: (1) in relation to an appeal under head (b) in the text, the effect of a decision of the Commissioner; or (2) otherwise, the decision of the Commissioner: *ibid* r 2(2).

19 *Ibid* rr 3(1), 4(1). The notice of appeal must: (1) identify the disputed decision and the date on which the notice relating to the decision was served on or given to the appellant; and (2) state: (a) the name and address of the appellant; (b) the grounds of the appeal; (c) whether the appellant considers that he is likely to wish a hearing to be held or not; (d) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under r 4(2) (see note 17 *supra*); and (e) an address for service of notices and other documents on the appellant: r 3(2). A notice of appeal may also include a request for an early hearing of the appeal and the reasons for that request: r 3(4). Furthermore, where an appeal is brought under head (1) in the text in relation to an information notice, the notice of appeal must also contain a statement of any representations the appellant wishes to make as to why it might be necessary in the interests of justice for the appeal to be heard and determined otherwise than by the chairman sitting alone as provided by r 18(2) (see para 570 text and note 27 *post*): r 3(3). For these purposes, 'appellant' means a person who brings or intends to bring an appeal under the Data Protection Act 1998 s 48: Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 2(2).

20 *Ibid* r 5(1)(a). The acknowledgement of service must be accompanied by a statement of the Tribunal's powers to award costs against the appellant: r 5(2). 'Costs' includes fees, charges, disbursements, expenses and remuneration: r 2(2). As to the Tribunal's power to make orders awarding costs see para 570 text and notes 55-59 *post*.

21 *Ibid* r 5(1)(b). In any proceedings before the Tribunal relating to an appeal, other than an appeal under head (a) or head (b) in the text, the burden of proof is with the Commissioner to satisfy the Tribunal that the disputed decision should be upheld: r 22.

22 *Ie* under the Data Protection Act 1998 s 48(3): see the text to notes 8-11 *supra*.

23 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 5(3)(a). Where a copy is sent to the Commissioner in accordance with this provision, the jurisdiction of the Tribunal in respect of an appeal under the Data Protection Act 1998 s 48(3) (see the text to notes 8-11 *supra*), which is usually exercised without notice by the chairman or a deputy chairman sitting alone (see Sch 6 para 6(2); and para 570 *post*) must not be exercised without notice: Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 5(3)(b).

24 *Ibid* rr 6(1), 6(2)(a).

25 *Ibid* r 6(2)(b). A reply under r 6 may include a request for an early hearing of the appeal and the reasons for that request: r 6(6).

26 *Ie* other than under the Data Protection Act 1998 s 48(3) (see the text to notes 8-11 *supra*).

27 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 6(1)(a).

28 *Ie* under the Data Protection Act 1998 s 48(3) (see the text to notes 8-11 *supra*).

29 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 6(1)(b). Before the expiry of the period under r 6(1)(a) (see the text to notes 26-27 *supra*) or r 6(1)(b), as the case may be, the Commissioner may apply to the Tribunal for an extension of that period, showing cause why, by reason of special circumstances, it would be just and right to do so, and the Tribunal may grant such extension as it considers appropriate: r 6(3).

30 *Ibid* r 6(4).

31 ie as provided by *ibid* r 18(2) (see para 570 text to note 27 post): r 6(5). 'Chairman' means the chairman of the Tribunal and includes a deputy chairman of the Tribunal presiding or sitting alone: r 2(2).

32 *Ibid* r 8(1).

33 ie received under *ibid* r 5(1)(b) or r 5(5)(3)(a) (as the case may be) (see the text to notes 21-23 *supra*). The provisions of r 5(1), (3) (see the text and notes 20-23 *supra*) apply to an amended notice of appeal and to any supplementary grounds of appeal as they do to a notice of appeal: r 8(2).

34 ie in the case of an appeal under the Data Protection Act 1998 s 48(3) (see the text to notes 8-11 *supra*), within such time (not exceeding 21 days from the date of that receipt) as the Tribunal may allow (Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 8(3)(a)); or, otherwise, within 21 days of the date of that receipt (r 8(3)(b)). Before the expiry of that period, the Commissioner may apply to the Tribunal for an extension of the period, showing cause why, by reason of special circumstances, it would be just and right to do so, and the Tribunal may grant such extension as it considers appropriate: r 6(3) (applied by s 8(4)).

35 *Ibid* r 8(5).

36 ie other than where the appeal is made under the Data Protection Act 1998 s 48(3) (see the text to notes 8-11 *supra*): Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 7(3).

37 ie a reply under *ibid* r 6(2) (see the text to notes 24-25 *supra*): r 7(1).

38 *Ibid* r 7(1).

39 *Ibid* r 7(2).

40 *Ibid* r 9(1).

41 ie in accordance with *ibid* r 27(1) (see note 17 *supra*): r 9(2). As to registered letters see note 17 *supra*.

42 ie a postal operator within the meaning of the Postal Services Act 2000 (see POST OFFICE): Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 9(2) (amended by SI 2001/1149).

43 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 9(3).

44 *Ibid* r 12(1) (amended by the Information Tribunal (Enforcement Appeals) (Amendment) Rules 2002, 2002/2722, rr 2, 6). The power to make an order under the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 12 is expressed to be for the purpose of determining an appeal under the Data Protection Act 1998 s 48: Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 12(1).

45 *Ibid* r 12(8). Such an order also requires the occupier, whether he is a party to the appeal or not (r 12(7)), to permit the Tribunal to be accompanied both by the parties and by such number of the officers or members of staff provided to the Tribunal as it considers necessary (r 12(2)). 'Party' means the appellant or the Commissioner, and, except where the context otherwise requires, references to a party include a person appointed under r 16 (see para 570 text and note 25 post) to represent his interests: r 2(2). The Tribunal must serve a copy of the order on the occupier and the parties (r 12(3)), and the time specified in the order must not be earlier than 7 days after the date of service of the copy (r 12(4)). Subject to r 12(4), the Tribunal may upon the application of the occupier or any of the parties alter the time specified in the order without being obliged to serve further copies, but it must notify the other persons so mentioned of the revised time: r 12(6). The Tribunal may upon the application of the occupier set the order aside: r 12(5).

UPDATE

568 Appeals to the Tribunal

NOTES--1998 Act s 48 modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

TEXT AND NOTES 15-45--SI 2000/189 replaced: Information Tribunal (Enforcement Appeals) Rules 2005, SI 2005/14 (amended by SI 2005/450).

NOTE 15--SI 2000/206 replaced: Information Tribunal (National Security Appeals) Rules 2005, SI 2005/13.

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569. Case management of appeals.

Where in the case of two or more appeals¹, it appears to the Information Tribunal² that some common question of law or fact arises in both or all of them, or that for some other reason it is desirable to so proceed, it may order that the appeals be consolidated or heard together³. However, the Tribunal must not make such an order without giving the parties an opportunity to show cause why such an order should not be made⁴.

The Tribunal may at any time of its own motion or on the application of any party⁵ give such directions as it thinks proper to enable the parties to prepare for the hearing of the appeal or to assist the Tribunal to determine the issues⁶. Such directions may in particular⁷:

- (1) provide for a particular matter to be dealt with as a preliminary issue and for a pre-hearing review to be held⁸; or
- (2) provide for: (a) the exchange between the parties of lists of documents held by them which are relevant to the appeal; (b) the inspection by the parties of the documents so listed; (c) the exchange between the parties of statements of evidence; and (d) the provision by the parties to the Tribunal of statements or lists of agreed matters⁹;
- (3) require any party to send to the Tribunal and to the other party:
 - 30. (a) statements of facts and statements of the evidence which will be adduced, including such statements provided in a modified or edited form;
 - 31. (b) a skeleton argument which summarises the submissions which will be made and cites the authorities which will be relied upon, identifying any particular passages to be relied upon;
 - 32. (c) a chronology of events;
 - 33. (d) any other particulars or supplementary statements which may reasonably be required for the determination of the appeal;
 - 34. (e) any document or other material which the Tribunal may require and which it is in the power of that party to deliver;
 - 35. (f) an estimate of the time which will be needed for any hearing; and
 - 36. (g) a list of the witnesses the party intends to call to give evidence at any hearing¹⁰;
- (4) limit the length of oral submissions and the time allowed for the examination and cross-examination of witnesses¹¹; and
- (5) limit the number of expert witnesses to be heard on either side¹².

The Tribunal may also specify time limits for steps to be taken in the proceedings and may extend any time limit¹³.

None of these provisions requires the production of any document or other material which the party could not be compelled to produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined¹⁴; and it is a condition of the supply of any information or material provided that any recipient of that information or material may use it only for the purposes of the appeal¹⁵.

The power to give directions may be exercised in the absence of the parties¹⁶.

Notice of any directions given must be served on the parties, and the Tribunal may, on the application of any party, set aside or vary such directions¹⁷.

1 As to the making of such an appeal see para 568 ante.

2 As to the Tribunal see para 521 ante.

3 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 10(1). The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

4 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 10(2).

5 For the meaning of 'party' see para 568 note 45 ante.

6 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 11(1).

7 Ibid r 11(2).

8 Ibid r 11(2)(a).

9 Ibid r 11(2)(b). The Tribunal may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law: r 23(1). However, no person may be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined: r 23(2). The Tribunal may require oral evidence of a witness (including a party) to be given on oath or affirmation and for that purpose the chairman or the proper officer has power to administer oaths or take affirmations: r 23(3).

10 Ibid r 11(2)(c).

11 Ibid r 11(2)(d).

12 Ibid r 11(2)(e).

13 Ibid r 11(3).

14 Ibid r 11(4).

15 Ibid r 11(5).

16 Ibid r 11(6).

17 Ibid r 11(7).

UPDATE

569 Case management of appeals

TEXT AND NOTES--SI 2000/189 replaced: Information Tribunal (Enforcement Appeals) Rules 2005, SI 2005/14 (amended by SI 2005/450).

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570. Hearing and determination of appeal.

Where the parties¹ agree in writing to do so, or it appears to the Information Tribunal² that the issues raised on the appeal³ have been determined on a previous appeal brought by the appellant⁴ on the basis of facts which did not materially differ from those to which the appeal relates and the Tribunal has given the parties an opportunity of making representations to the effect that the appeal ought not to be determined without a hearing, the Tribunal may determine an appeal, or any particular issue, without a hearing⁵.

Otherwise, as soon as practicable after notice of appeal has been given⁶, and with due regard to the convenience of the parties and any request made⁷, the Tribunal must appoint a time and place for a hearing of the appeal⁸. The proper officer⁹ must send to each party¹⁰ a notice informing him of the time and place of any hearing¹¹. Any such notice to a party must inform him that¹² if, without furnishing the Tribunal with sufficient reason for his absence, he fails to appear at a hearing, having been duly notified of the hearing, the Tribunal may, if that party is the appellant, dismiss the appeal or, in any case, hear and determine the appeal, or any particular issue, in the party's absence and may make such order as to costs as it thinks fit¹³.

The Tribunal may postpone the time appointed for any hearing, or adjourn a hearing to such time as the Tribunal may determine, or alter the place appointed for any hearing; and, if it exercises any of these powers, it must notify each party previously notified of that hearing, and any person summoned to attend as a witness¹⁴ at that hearing, of the revised arrangements¹⁵.

For the purpose of hearing and determining appeals or any matter preliminary or incidental to an appeal, the Tribunal must sit at such times and in such places as the chairman or a deputy chairman may direct and may sit in two or more divisions¹⁶.

In cases other than where national security rules apply¹⁷, and other than where the appeal is against the Information Commissioner's statement (or its effect) in an enforcement notice, information notice or special information notice¹⁸, and subject to any rules of procedure¹⁹, the Tribunal is duly constituted for an appeal if it consists of the chairman or a deputy chairman (who presides), and an even number of the appointed members²⁰.

The determination of any question before the Tribunal as duly constituted is according to the opinion of the majority of the members hearing the appeal²¹.

The Tribunal may by summons require any person in the United Kingdom to attend as a witness at a hearing of an appeal at such time and place as may be specified in the summons; and, at the hearing, to answer any questions or produce any documents in his custody or under his control which relate to any matter in question in the appeal²². No person is required to attend in obedience to such a summons unless he has been given at least 7 days' notice of the hearing or, if less than 7 days, he has informed the Tribunal that he accepts such notice as he has been given²³; and the Tribunal may upon the application of a person so summoned set the summons aside²⁴.

At any hearing by the Tribunal a party may conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose²⁵.

Where an appeal is made against an information notice²⁶, any hearing of or relating to the appeal must be by the chairman sitting alone, and any such appeal or issue arising therefrom must be determined by the chairman sitting alone²⁷.

All hearings by the Tribunal (including preliminary hearings) must be in public unless, having regard to the desirability of safeguarding the privacy of data subjects or commercially sensitive information, the Tribunal directs that the hearing or any part of the hearing must take place in private²⁸. The jurisdiction of the Tribunal in respect of an appeal against the Commissioner's statement (or its effect) in an enforcement notice, information notice or special information notice²⁹ must be exercised without notice by the chairman or a deputy chairman sitting alone³⁰.

Except where the appeal is determined in default of appearance³¹, the Tribunal must at the hearing of an appeal give to each party³² an opportunity³³: (1) to address the Tribunal and to amplify orally written statements previously furnished, to give evidence and to call witnesses, and to put questions to any person giving evidence before the Tribunal³⁴; and (2) to make representations on the evidence (if any) and on the subject matter of the appeal generally but, where evidence is taken, such opportunity must not be given before the completion of the taking of evidence³⁵.

The Tribunal must conduct the proceedings in such manner as it considers appropriate in the circumstances for discharging its functions and must so far as appears to it appropriate seek to avoid formality in its proceedings³⁶.

If, on an appeal against an enforcement notice, an information notice or a special information notice which has been served³⁷, the Tribunal considers: (a) that the notice against which the appeal is brought is not in accordance with the law; or (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal must allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and, in any other case, the Tribunal must dismiss the appeal³⁸. On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based³⁹.

If on an appeal against the refusal of an application for cancellation or variation of an enforcement notice which has been served⁴⁰, the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal must cancel or vary the notice⁴¹.

On an appeal against the Commissioner's statement (or its effect) in an enforcement notice, information notice or special information notice⁴², the Tribunal may direct⁴³:

- (i) that the notice in question has effect as if it did not contain a statement⁴⁴; or
- (ii) that the inclusion of the statement does not have effect in relation to any part of the notice⁴⁵,

and may make such modifications in the notice as may be required for giving effect to the direction⁴⁶.

On an appeal by a data controller⁴⁷ in respect of whom a determination has been made⁴⁸, the Tribunal may cancel the determination of the Commissioner⁴⁹.

Any irregularity resulting from failure to comply with any provision of the rules of procedure⁵⁰, or of any direction of the Tribunal before the Tribunal has reached its decision, does not of itself render the proceedings void⁵¹. However, the Tribunal may, and it must if it considers that any person may have been prejudiced by that irregularity, give such directions or take such steps as it thinks fit before reaching its decision to cure or waive the irregularity, whether by amendment of any document, the giving of notice or otherwise⁵².

As soon as practicable after the Tribunal has determined an appeal, the chairman must certify in writing that determination and sign and date the certificate⁵³, a copy of which must be sent to the parties by the proper officer⁵⁴.

In any appeal before the Tribunal (including one withdrawn⁵⁵), the Tribunal may make an order awarding costs either⁵⁶: (A) against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable⁵⁷; or (B) against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable⁵⁸; or (C) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of the other⁵⁹.

The Tribunal must make arrangements for the publication of its determination but in doing so must have regard to the desirability of safeguarding the privacy of data subjects and commercially sensitive information, and for that purpose may make any necessary amendments to the text of the certificate⁶⁰.

If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court⁶¹. Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court⁶².

1 For the meaning of 'party' see para 568 note 45 ante. However, see also note 10 infra.

2 As to the Tribunal see para 521 ante.

3 As to the making of an appeal see para 568 ante.

4 For the meaning of 'appellant' see para 568 note 19 ante. The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

5 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 13(1). Before determining any matter in this way, the Tribunal may if it thinks fit direct any party to provide in writing further information about any matter relevant to the appeal within such time as the Tribunal may allow: r 13(2).

6 See para 568 ante.

7 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 14(1). A notice of appeal (see r 3(4); and para 568 note 19 ante) or a reply made under r 6 (see r 6(6); and para 568 note 25 ante) may include a request for an early hearing of the appeal and the reasons for that request.

8 Ibid r 14(1). The time so notified must not be earlier than 14 days after the date on which the notice is sent unless the parties agree otherwise, or the appellant agrees otherwise, and the hearing relates to an appeal under the Data Protection Act 1998 s 48(3) (see para 568 text to notes 8-11 ante): Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 14(4).

9 For the meaning of 'proper officer' see para 572 note 14 post.

10 The reference to 'party' does not include the Information Commissioner in the case of an appeal under the Data Protection Act 1998 s 48(3) (see para 568 text to notes 8-11 ante) other than a case to which the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 5(3)(a) applies (see para 568 text to notes 22-23 ante): r 14(3). As to the Commissioner see para 518 ante.

11 Ibid r 14(2).

12 Ibid r 14(5).

13 Ibid r 17. As to the Tribunal's power to make orders awarding costs see the text and notes 55-59 infra.

14 As to witnesses see ibid r 15; and the text to notes 22-24 infra.

15 Ibid r 14(6).

16 Data Protection Act 1998 Sch 6 para 1. As regards matters preliminary or incidental to an appeal the chairman may act for the Tribunal under the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 4(2) (see para 568 note 17 ante), r 6(1), (3) (see para 568 text to notes 24-29 ante), rr 8-12 (see paras 568-569 ante), r 14(1) (see the text to notes 6-8 supra), r 14(6) (see text to notes 14-15 supra) to the extent that the Tribunal may postpone the time or alter the place appointed for any hearing, and r 15 (see the text to notes 22-24 infra): r 21.

17 See the Data Protection Act 1998 s 28(4), (6). As to the rules that operate when issues of national security are being considered see the Data Protection Tribunal (National Security Appeals) Rules 2000, SI

2000/206 (as amended) (see paras 572-574 post); and the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731 (as amended) (see para 572 post). The Data Protection Tribunal is now known as the Information Tribunal: Freedom of Information Act 2000 s 18(2).

18 Ie other than where the appeal is made under the Data Protection Act 1998 s 48(3) (see para 568 text to notes 8-11 ante). As to enforcement notices see para 559 ante. As to information notices see para 562 ante. As to special information notices see para 563 ante.

19 Ie the rules of procedure made under the Data Protection Act 1998 Sch 6 para 7: Sch 6 para 4(1).

20 Ie members appointed in accordance with *ibid* s 6(6)(a), (b): Sch 6 para 4(1). The members who are to constitute the Tribunal in accordance with these provisions are nominated by the chairman or, if he is for any reason unable to act, by a deputy chairman: Sch 6 para 4(2). As to the proper constitution of the Tribunal for the purposes of an appeal under the Freedom of Information Act 2000 s 57 (see para 614 post) see the Data Protection Act 1998 Sch 6 para 4(1A).

21 *Ibid* Sch 6 para 5.

22 Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 15(1). This provision is subject to r 23(2), (3) (see para 569 note 9 ante): r 15(1). A person who has attended a hearing as a witness in obedience to a summons is entitled to such sum as the Tribunal considers reasonable in respect of his attendance at, and his travelling to and from, the hearing; and where the summons was issued at the request of a party such sum must be paid or tendered to him by that party: r 15(4).

23 *Ibid* r 15(2).

24 *Ibid* r 15(3).

25 *Ibid* r 16(1). For these purposes, references to a 'party' do not include the Commissioner in the case of an appeal under the Data Protection Act 1998 s 48(3) (see para 568 text to notes 8-11 ante) other than a case to which the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 5(3)(a) (see para 568 note 23 ante) applies: r 16(2).

26 Ie under the Data Protection Act 1998 s 48(1) in respect of an information notice (see para 568 head (1) ante): Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 18(1).

27 *Ibid* r 18(2). This provision does not apply where it appears to the chairman that a hearing or determination by the Tribunal duly constituted (see the Data Protection Act 1998 Sch 6 para 4; and notes 17-20 supra) is necessary in the interests of justice, taking into account any representations made under the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 3(3) (see para 568 note 19 ante), r 6(5) (see para 568 text to note 31 ante): r 18(3).

28 *Ibid* r 19(1). Notwithstanding that a hearing is in private, the following persons may attend in addition to the parties: (1) the chairman or any deputy chairman or member of the Tribunal in his capacity as such, notwithstanding that they do not constitute the Tribunal for the purpose of the hearing; and (2) any other person with the permission of the Tribunal and the consent of the parties present: r 19(2). Whether or not a hearing is held in public, a member of the Council on Tribunals may attend the hearing, and may remain present during the deliberations of the Tribunal but must not take part in the deliberations: r 19(3). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) para 55 et seq.

29 Ie where the appeal is made under the Data Protection Act 1998 s 48(3): see para 568 text to notes 8-11 ante.

30 *Ibid* Sch 6 para 6(2).

31 Ie except where the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 17 is applied (see the text to note 13 supra).

32 *Ibid* r 20(1). For these purposes, a 'party' does not include the Commissioner in the case of an appeal under the Data Protection Act 1998 s 48(3) (see para 568 text to notes 8-11 ante): Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 20(2). In a case to which r 5(3)(a) applies (see para 568 note 23 ante), the Tribunal must give the Commissioner the opportunity specified in head (1) and head (2) in the text to the extent that it is of the opinion that the interests of justice require the Commissioner to assist it by giving evidence or being heard on any matter relating to the appeal: r 20(3).

33 *Ibid* r 20(1).

34 *Ibid* r 20(1)(a).

35 Ibid r 20(1)(b).

36 Ibid r 20(4).

37 Ie an appeal under the Data Protection Act 1998 s 48(1): see para 568 text to head (1) ante.

38 Ibid s 49(1).

39 Ibid s 49(2).

40 Ie an appeal under ibid s 48(2): see para 568 text to head (2) ante.

41 Ibid s 49(3).

42 Ie an appeal under ibid s 48(3): see para 568 text to notes 8-11 ante.

43 Ibid s 49(4).

44 Ie ibid s 49(4)(a). The reference in the text is a reference to any such statement as is mentioned in s 48(3): see para 568 text to notes 8-11 ante.

45 Ibid s 49(4)(b).

46 Ibid s 49(4).

47 For the meaning of 'data controller' see para 506 note 7 ante.

48 Ie an appeal under the Data Protection Act 1998 s 48(4): see para 568 text to notes 12-14 ante.

49 Ibid s 49(5).

50 Ie the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189.

51 Ibid r 26(1).

52 Ibid r 26(1). Clerical mistakes in any document recording or certifying a direction, decision or determination of the Tribunal or chairman, or errors arising in such a document from an accidental slip or omission, may at any time be corrected by the chairman, by certificate signed by him: r 26(2).

53 Ibid r 24(1). The certificate must include any material finding of fact, and the reasons for the decision: r 24(2).

54 Ibid r 24(3).

55 See ibid r 9; and para 568 notes 40-42 ante.

56 Ibid r 25(1). The Tribunal must not make such an order awarding costs against a party without first giving that party an opportunity of making representations against the making of the order: r 25(2). Any such order may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed): r 25(3). Any costs so required to be taxed may be taxed in the county court according to such of the scales prescribed for proceedings in the county court as is directed by the order: r 25(4).

57 Ibid r 25(1)(a).

58 Ibid r 25(1)(b).

59 Ibid r 25(1)(c).

60 Ibid r 24(4). As to the protection afforded to confidential information in litigation under the law of confidence, particularly in relation to trade secrets, see para 502 ante.

61 Data Protection Act 1998 Sch 6 para 8(1). As to contempt of court see CONTEMPT OF COURT.

62 Ibid Sch 6 para 8(2).

UPDATE

570 Hearing and determination of appeal

TEXT AND NOTES--SI 2000/189 replaced: Information Tribunal (Enforcement Appeals) Rules 2005, SI 2005/14 (amended by SI 2005/450).

NOTE 20--1998 Act Sch 6 para 4(1) modified for the purposes of the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

NOTE 49--1998 Act s 49(5) omitted for the purposes of SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(iii) Appeals/A. APPEALS OTHER THAN IN RELATION TO NATIONAL SECURITY CERTIFICATES/571. Right of appeal to the High Court.

571. Right of appeal to the High Court.

Any party¹ to an appeal² to the Tribunal³ may appeal from the decision of the Tribunal on a point of law to the High Court of Justice if the address of the person who was the appellant⁴ before the Tribunal is in England or Wales⁵.

1 For the meaning of 'party' see para 568 note 45 ante.

2 For the meaning of 'appeal' see para 568 note 16 ante.

3 Ie an appeal made under the Data Protection Act 1998 s 48 (see para 568 text to notes 1-15 ante): s 49(6). As to the Tribunal see para 521 ante.

4 For the meaning of 'appellant' see para 568 note 19 ante.

5 Data Protection Act 1998 s 49(6)(a). For the purposes of s 49(6): (1) the address of a registered company is that of its registered office; and (2) the address of a person (other than a registered company) carrying on a business is that of his principal place of business in the United Kingdom: s 49(7). For the meanings of 'registered company' and 'business' see para 538 note 5 ante. For the meaning of 'United Kingdom' see para 504 note 4 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(iii) Appeals/B. APPEALS IN RELATION TO NATIONAL SECURITY CERTIFICATES/572. Appeals in relation to a national security certificate.

B. APPEALS IN RELATION TO NATIONAL SECURITY CERTIFICATES

572. Appeals in relation to a national security certificate.

Any person directly affected by the issuing of a national security certificate¹ may appeal to the Information Tribunal² against the certificate³. Such an appeal to the Tribunal may also be made by any person who is party to proceedings under or by virtue of the Data Protection Act 1998

on the ground that a national security certificate does not have the scope claimed for it by the data controller⁴; and on any such appeal, the Tribunal may determine that the certificate does not apply⁵.

Provision has been made for rules of procedure in relation to such appeals and the proceedings of the Tribunal in respect of any such appeal⁶. When exercising its functions under these provisions, the Tribunal must secure that information is not disclosed contrary to the interests of national security⁷.

An appeal⁸ must be brought by a written notice of appeal served on the Tribunal⁹. In the case of an appeal against the certificate itself¹⁰, a notice of appeal may be served on the Tribunal at any time during the currency of the disputed certification to which it relates¹¹. Where the appeal is against the scope of the certificate¹², a notice of appeal must be served on the Tribunal within 28 days of the date on which the claim constituting the disputed certification was made¹³.

Upon receipt of such a notice of appeal, the proper officer¹⁴ must send an acknowledgment of the service of a notice of appeal to the appellant¹⁵, and a copy of the notice of appeal both to the relevant minister¹⁶ and to the Information Commissioner¹⁷. In the case of an appeal against the scope of the certificate¹⁸, the proper officer must send a copy of the notice of appeal also to the respondent data controller¹⁹.

No later than 42 days after receipt of such a copy of a notice of appeal, the relevant minister must send to the Tribunal a copy of the certificate to which the appeal relates²⁰, and a written notice²¹ stating:

- (1) in relation to an appeal against the certificate itself²²: (a) whether or not he intends to oppose the appeal and, if so, a summary of the circumstances relating to the issue of the certificate, and the reasons for the issue of the certificate; (b) the grounds upon which he relies in opposing the appeal; and (c) a statement of the evidence upon which he relies in support of those grounds²³; and
- (2) in relation to an appeal against the scope of the certificate²⁴: (a) whether or not he wishes to make representations in relation to the appeal and, if so the extent to which he intends to support or oppose the appeal; (b) the grounds upon which he relies in supporting or opposing the appeal; and (c) a statement of the evidence upon which he relies in support of those grounds²⁵.

Except where the Tribunal proposes a summary disposal of the appeal²⁶, the proper officer must send a copy of the notice to the appellant, to the Commissioner and (in the case of an appeal against the scope of the certificate²⁷) to the respondent data controller²⁸.

Within 42 days of the date on which a respondent data controller receives a copy of a notice of appeal²⁹, he must send to the Tribunal a written reply acknowledging service upon him of the notice of appeal, and stating whether or not he intends to oppose the appeal and, if so, the grounds upon which he relies in opposing the appeal³⁰. Except where the Tribunal proposes a summary disposal of the appeal³¹, the proper officer must send a copy of the reply to the relevant minister, to the appellant and to the Commissioner³².

With the permission of the Tribunal, the appellant may amend his notice of appeal or deliver supplementary grounds of appeal³³. Upon receipt of a copy of such an amended notice of appeal or amended grounds of appeal (or in any case, with the permission of the Tribunal³⁴), the relevant minister may amend his notice in reply³⁵ and (in the case of an appeal against the scope of the certificate³⁶) the respondent data controller may amend his reply to the notice of appeal³⁷.

Where the relevant minister or (in the case of an appeal against the scope of the certificate³⁸) the respondent data controller is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal, or that the notice of appeal discloses no reasonable grounds of

appeal, he may include in his notice³⁹ or, as the case may be, his reply⁴⁰ a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out⁴¹. An application for striking out may be heard as a preliminary issue or at the beginning of the hearing of the substantive appeal⁴².

The relevant minister may send a notice of objection to the Tribunal where he objects, on grounds of the need to secure that information is not disclosed contrary to the interests of national security, to the disclosure of: (i) his notice in reply to the appellant, the Commissioner or (in the case of an appeal against the scope of the certificate⁴³) the respondent data controller⁴⁴; or (ii) the reply of a respondent data controller to the appellant or the Commissioner⁴⁵. Such a notice of objection must state the reasons for the objection⁴⁶; and in the case of a notice in reply to the appellant, if and to the extent it is possible to do so without disclosing information contrary to the interests of national security, it must be accompanied by a version of the relevant minister's notice in a form which can be shown to the appellant, the Commissioner or, as the case may be, the respondent data controller⁴⁷. Where the relevant minister sends a notice of objection, the Tribunal must not disclose the material in question otherwise than in accordance with the procedure for determinations on relevant minister's objections and applications⁴⁸.

The appellant may at any time withdraw his appeal by sending to the Tribunal a notice of withdrawal signed by him or on his behalf, and the proper officer must send a copy of that notice to the relevant minister, the Commissioner, and (in the case of an appeal against the scope of the certificate⁴⁹) the respondent data controller⁵⁰. Such a notice, if sent by post in a registered letter or by the recorded delivery service to the proper officer of the Tribunal⁵¹, has effect on the date on which it is received for dispatch by the postal operator concerned⁵². Where an appeal is withdrawn in this way a fresh appeal may not be brought by the appellant in relation to the same disputed certification except with the permission of the Tribunal⁵³.

1 Ie a national security certificate issued under the Data Protection Act 1998 s 48(2): see para 546 text to notes 4-5 ante.

2 As to the Tribunal see para 521 ante.

3 Data Protection Act 1998 s 28(4). If on an appeal under s 28(4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate: s 28(5).

4 Ibid s 28(6). A certificate may identify the personal data to which it applies by means of a general description and it is conclusively presumed so to apply subject to any determination on the question: s 28(6). For the meaning of 'data controller' see para 506 note 7 ante.

5 Ibid s 28(7).

6 See ibid s 28(12), Sch 6 (as amended); and the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (as amended). See also the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731 (as amended), which confer a right to appeal in respect of traffic and billing data. The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

7 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 3(1). For these purposes, the disclosure of information is regarded as contrary to the interests of national security if it would indicate the existence or otherwise of any material: r 3(3).

8 For these purposes, 'appeal' means an appeal under the Data Protection Act 1998 s 28: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2).

9 Ibid r 4(1). The notice of appeal must identify the disputed certification and state the name and address of the appellant, the grounds of the appeal, and an address for service of notices and other documents on the appellant: r 4(2). 'Disputed certification' means: (1) in relation to an appeal under the Data Protection Act 1998 s 28(4) (see the text to notes 1-3 supra), the certificate against which the appeal is brought or intended to be brought; and (2) in relation to an appeal under s 28(6) (see the text to note 4 supra), the claim by the data controller, against which the appeal is brought or intended to be brought, that a certificate applies to any

personal data: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2). 'Appellant' means a person who brings or intends to bring an appeal under the Data Protection Act 1998 s 28: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2). In the case of an appeal under the Data Protection Act 1998 s 28(6) (see the text to note 4 supra), the notice of appeal must also state: (a) the date on which the respondent data controller made the claim constituting the disputed certification; (b) an address for service of notices and other documents on the respondent data controller; and (c) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under r 5(3) (see note 13 infra): Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 4(3). 'Respondent data controller', in relation to an appeal under the Data Protection Act 1998 s 28(6), means the data controller making the claim which constitutes the disputed certification: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2).

If sent by post in accordance with r 30(1), a notice of appeal is treated as having been served on the date on which it is received for dispatch by the postal operator (within the meaning of the Postal Services Act 2000: see POST OFFICE) concerned: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 5(4) (amended by SI 2001/1149). Any notice or other document required or authorised by the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (as amended), to be served on or sent to any person or authority may be sent by post in a registered letter or by the recorded delivery service: (i) in the case of the Tribunal, to the proper officer of the Tribunal; (ii) in the case of an appellant or a respondent data controller, to him at his address for service under the rules; (iii) in the case of the relevant minister or the Information Commissioner, to him at his office: r 30(1). An appellant or respondent data controller may at any time by notice to the Tribunal change his address for service under the Rules: r 30(2). As to the Commissioner see para 518 ante.

- 10 ie under the Data Protection Act 1998 s 28(4): see the text to note 3 supra.
- 11 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 5(1).
- 12 ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

13 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 5(2). The Tribunal may accept a notice of appeal served after the expiry of this period if it is of the opinion that, by reason of special circumstances, it is just and right to do so: r 5(3). A notice of appeal must, if sent by post in accordance with r 30(1) (see note 9 supra) be treated as having been served on the date on which it is received for dispatch by the postal operator (within the meaning of the Postal Services Act 2000: see POST OFFICE) concerned: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 5(4) (amended by SI 2001/1149). As regards matters preliminary or incidental to an appeal the president may act for the Tribunal under the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 5(3), r 8(2) (see note 30 infra), r 9 (see the text to notes 33-37 infra), r 13 (see the text to notes 49-53 infra), rr 14-15 (see para 573 post), r 19(1) (see para 574 text to notes 26-27 post), r 19(4) (see para 574 text to notes 33-35 post) to the extent that the Tribunal may postpone the time or alter the place appointed for any hearing, and r 20 (see para 574 text to notes 43-46 post): r 25. 'President' means the person designated by the Lord Chancellor under the Data Protection Act 1998 Sch 6 para 3 (see para 574 text to notes 37-41 post) to preside when the Tribunal is constituted under Sch 6 para 3: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

14 'Proper officer', in relation to any rule, means an officer or member of staff duly provided to the Tribunal under the Data Protection Act 1998 Sch 5 and appointed by the chairman to perform the duties of a proper officer under that rule: Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 2(2).

15 Ibid r 6(1)(a). The acknowledgment of service must be accompanied by a statement of the Tribunal's powers to award costs against the appellant under r 28: r 6(2). 'Costs' includes fees, charges, disbursements, expenses and remuneration: r 2(2). In any appeal before the Tribunal (including one withdrawn under r 13: see the text to notes 49-53 infra), the Tribunal may make an order awarding costs: (1) in the case of an appeal against the certificate itself (see the text to notes 1-3 supra): (a) against the appellant and in favour of the relevant minister (see note 16 infra) where it considers that the appeal was manifestly unreasonable; (b) against the relevant minister and in favour of the appellant where it allows the appeal and quashes the disputed certification, or does so to any extent; and (2) in the case of an appeal against the scope of the certificate (see the text to note 4 supra): (a) against the appellant and in favour of any other party where it dismisses the appeal or dismisses it to any extent; (b) in favour of the appellant and against any other party where it allows the appeal or allows it to any extent; and (3) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction, or for any delay which with diligence could have been avoided, against that party and in favour of the other: r 28(1). The Tribunal must not make such an order awarding costs against a party without first giving that party an opportunity of making representations against the making of the order (r 28(2)); and such an order may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that other party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed) (r 28(3)). Any costs required by such an order may be taxed in the county court according to such of the scales prescribed for proceedings in the county court as is directed by the order: r 28(4).

16 'Relevant minister' means the Minister of the Crown who is responsible for the signing of the certificate under the Data Protection Act 1998 s 28(2) (see para 546 ante) to which the appeal relates, and except where the context otherwise requires, references to the relevant minister include a person appointed under the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 21 (see para 574 text to notes 47-49 post) to represent his interests: r 2(2). For the meaning of 'Minister of the Crown' see para 509 note 13 ante.

17 Ibid r 6(1)(b).

18 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

19 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 6(1)(b)(iii). For the meaning of 'disputed certification' see note 11 supra.

20 Ibid r 7(1)(a).

21 Ibid r 7(1)(b).

22 Ie an appeal under the Data Protection Act 1998 s 28(4): see the text to note 3 supra.

23 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 7(2)(a).

24 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

25 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 7(2)(b).

26 Ie in accordance with ibid r 11: see para 574 text to notes 1-11 post.

27 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

28 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 7(3).

29 Ie a copy received under ibid r 6(1)(b): see the text to notes 14-19 supra.

30 Ibid r 8(1). Before the expiry of this period of 42 days, the respondent data controller may apply to the Tribunal for an extension of that period, showing cause why, by reason of special circumstances, it would be just and right to do so, and the Tribunal may grant such extension as it considers appropriate: r 8(2).

31 Ie in accordance with ibid r 11: see para 574 notes 1-11 post.

32 Ibid r 8(3). The sending of a copy to the appellant and the Commissioner is subject to r 8(4) and r 12 (see the text to notes 43-48 infra): r 8(3). No copy may be sent to the appellant and the Commissioner before the period of 42 days referred to in r 12(2)(b) (see note 45 infra) has expired, otherwise than in accordance with r 12 (see the text to notes 43-48 infra), unless the relevant minister has indicated that he does not object: r 8(4).

33 Ibid r 9(1). Rules 6(1) (see the text to notes 14-19 supra), 11(1)(a) (see para 574 text to notes 1, 6-7 post) apply to an amended notice of appeal and to supplementary grounds of appeal as they do to a notice of appeal: r 9(2).

34 Ibid r 9(5).

35 Ibid rr 9(3), 9(5)(a). An amended notice or reply must be sent to the Tribunal within 28 days of the date on which the copy is received: r 9(4). Rules 7(3) (see the text to notes 26-28 supra), 11(1)(b) (see para 574 text to notes 2-3, 6-7 post), 12(1)(a) (see the text to notes 43-44 infra) apply to an amended notice in reply by the relevant minister provided under r 9(3) or r 9(5) (see the text to note 34 supra) as they do to a notice in reply: r 9(6).

36 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

37 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 9(3), (5)(b). Rules 8(3), (4) (see the text to notes 31-32 supra), 11(1)(c) (see para 574 text to notes 4-7 post), 12(1)(b) (see the text to note 45 infra) apply to an amended reply by the respondent data controller provided under r 9(3) or r 9(5) (see also the text to notes 34-36 supra) as they do to a notice in reply: r 9(7).

38 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

39 Ie his notice under the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 7: see the text to notes 20-28 supra.

40 Ie his reply under *ibid* r 8: see the text to notes 29-32 supra.

41 *Ibid* r 10(1).

42 *Ibid* r 10(2).

43 Ie under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

44 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 12(1)(a). In this case the notice of objection must be sent with the notice in reply: r 12(2)(a).

45 *Ibid* r 12(1)(b). In this case the notice of objection must be sent within 42 days of the date on which he receives the copy mentioned in r 8(3) (see the text to notes 31-32 supra): r 12(2)(b).

46 *Ibid* r 12(3)(a).

47 *Ibid* r 12(3)(b).

48 Ie in accordance with the procedure in *ibid* r 17 (see para 574 text to notes 20-24 post): r 12(4).

49 Ie an appeal under the Data Protection Act 1998 s 28(6): see the text to note 4 supra.

50 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 13(1).

51 Ie in accordance with *ibid* r 30(1) (see note 9 supra): r 13(2) (amended by SI 2001/1149). Any reference in any legislation or legal document to 'Registered Post' or 'the Registered Service' must be taken to be a reference to 'Special Delivery', which is the brand name used to denote the type of service previously provided by the registered post service, as it is the same service in all material particulars: see the Post Office Inland Letter Post Scheme 1989 para 3(1). As to Special Delivery and the Recorded Delivery Service see POST OFFICE vol 36(2) (Reissue) paras 116-119.

52 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 13(2) (as amended: see note 51 supra).

53 *Ibid* 13(3).

UPDATE

572-574 Appeals in relation to national security certificates

SI 2000/206 replaced: Information Tribunal (National Security Appeals) Rules 2005, SI 2005/13.

572 Appeals in relation to a national security certificate

TEXT AND NOTES 1-3--The Information Commissioner is entitled to appeal under the 1998 Act s 28(4) against the issue of a certificate of exemption: *R (on the application of the Secretary of State for the Home Department) v Information Tribunal* [2006] EWHC 2958 (Admin), [2007] 2 All ER 703, DC.

573. Case management of appeals in relation to a national security certificate.

Where in the case of two or more appeals in relation to a national security certificate¹, it appears to the Information Tribunal² that some common question of law or fact arises in both or all of them, or that for some other reason it is desirable to so proceed, it may order that the appeals be consolidated or heard together³. However, the Tribunal must not make such an order without giving the parties and the relevant minister⁴ an opportunity to show cause why such an order should not be made⁵.

The Tribunal may at any time of its own motion or on the application of any party⁶ give such directions as it thinks proper to enable the parties to prepare for the hearing of the appeal or to assist the Tribunal to determine the issues⁷. Such directions may in particular:

- (1) provide for a particular matter to be dealt with as a preliminary issue and for a pre-hearing review to be held⁸; or
- (2) provide for: (a) the exchange between the parties of lists of documents held by them which are relevant to the appeal; (b) the inspection by the parties of the documents so listed; (c) the exchange between the parties of statements of evidence; and (d) the provision by the parties to the Tribunal of statements or lists of agreed matters⁹;
- (3) require any party to send to the Tribunal and to the other parties:

- 37. (a) statements of facts and statements of the evidence which will be adduced, including such statements provided in a modified or edited form;
- 38. (b) a skeleton argument which summarises the submissions which will be made and cites the authorities which will be relied upon, identifying any particular passages to be relied upon;
- 39. (c) a chronology of events;
- 40. (d) any other particulars or supplementary statements which may reasonably be required for the determination of the appeal;
- 41. (e) any document or other material which the Tribunal may require and which it is in the power of that party to deliver;
- 42. (f) an estimate of the time which will be needed for any hearing; and
- 43. (g) a list of the witnesses the party intends to call to give evidence at any hearing¹⁰;

- (4) limit the length of oral submissions and the time allowed for the examination and cross-examination of witnesses¹¹; and
- (5) limit the number of expert witnesses to be heard on either side¹².

The Tribunal may also specify time limits for steps to be taken in the proceedings and may extend any time limit¹³.

None of these provisions requires the production of any document or other material which the party could not be compelled to produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined¹⁴; and it is a condition of the supply of any information or material provided that any recipient of that information or material may use it only for the purposes of the appeal¹⁵.

The power to give directions may be exercised in the absence of the parties¹⁶.

Notice of any directions given in accordance with the provisions described above must be served on the parties, and the Tribunal may, on the application of any party, set aside or vary such directions¹⁷.

- 1 As to the making of an appeal in relation to a national security certificate see para 572 ante.
- 2 As to the Tribunal see para 521 ante.
- 3 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 14(1). The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.
- 4 For the meaning of 'the relevant minister' see para 572 note 16 ante.
- 5 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 14(2).
- 6 For these purposes, 'party' includes the relevant minister notwithstanding that he may not be a party to an appeal under the Data Protection Act 1998 s 28(6) (see para 572 ante): Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 15(2).
- 7 Ibid r 15(3).
- 8 Ibid r 15(4)(a).
- 9 Ibid r 15(4)(b). The Tribunal may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law: r 26(1). However, no person may be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action in a court of law in that part of the United Kingdom where the appeal is to be determined: r 26(2). The Tribunal may require oral evidence of a witness (including a party) to be given on oath or affirmation and for that purpose the president or the proper officer has power to administer oaths or take affirmations: r 26(3). For the meaning of 'United Kingdom' see para 504 note 4 ante. As to the president see para 572 note 13 ante. For the meaning of 'proper officer' see para 572 note 14 ante.
- 10 Ibid r 15(4)(c).
- 11 Ibid r 15(4)(d).
- 12 Ibid r 15(4)(e).
- 13 Ibid r 15(5).
- 14 Ibid r 15(6).
- 15 Ibid r 15(7).
- 16 Ibid r 15(8).
- 17 Ibid r 15(9).

UPDATE

572-574 Appeals in relation to national security certificates

SI 2000/206 replaced: Information Tribunal (National Security Appeals) Rules 2005, SI 2005/13.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(iii) Appeals/B. APPEALS IN RELATION TO NATIONAL SECURITY CERTIFICATES/574. Hearing and determination of appeal in relation to a national security certificate.

574. Hearing and determination of appeal in relation to a national security certificate.

Where, having considered the notice of appeal¹, the notice of the relevant minister² in reply³ and (in the case of an appeal against the scope of the certificate⁴) the respondent data controller's reply⁵, the Information Tribunal⁶ is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith, it may so determine the appeal⁷. Where the Tribunal proposes to determine an appeal in this way, it must first notify the appellant⁸ and the relevant minister of the proposal⁹. The notification to the appellant must contain particulars of the appellant's entitlement¹⁰ to make written representations, and to request the Tribunal to hear oral representations against the proposal to make a summary disposal of the appeal¹¹.

Before the Tribunal proceeds with any proposal to give or vary any direction¹², or to issue a summons¹³, or to certify or publish a determination¹⁴, it must first notify the relevant minister of the proposal¹⁵. If the relevant minister considers that proceeding as proposed by the Tribunal would cause information to be disclosed contrary to the interests of national security¹⁶, he may make an application to the Tribunal requesting it to reconsider the proposal or reconsider it to any extent¹⁷. Any such application by the relevant minister must be made within 14 days of the receipt of notification, and the Tribunal must not proceed as proposed before that period has expired, unless the relevant minister has indicated that he does not object¹⁸. Where the relevant minister makes such an application, the Tribunal must not proceed as proposed otherwise than in accordance with the procedure reserved for determinations on the relevant minister's applications¹⁹.

Except where a summary disposal of the appeal is made²⁰, the Tribunal must determine whether to uphold any objection of the relevant minister²¹ (and any application made by the relevant minister in relation to one of its proposals²²) in the absence of the parties²³, except that the relevant minister (or a person authorised to act on his behalf) may attend any proceedings, whether or not he is a party to the appeal in question²⁴.

Where the parties agree in writing to do so, or it appears to the Tribunal that the issues raised on the appeal have been determined on a previous appeal brought by the appellant on the basis of facts which did not materially differ from those to which the appeal relates and the Tribunal has given the parties an opportunity of making representations to the effect that the appeal ought not to be determined without a hearing, the Tribunal may determine an appeal, or any particular issue, without a hearing²⁵.

Otherwise, as soon as practicable after notice of appeal has been given²⁶, and with due regard to the convenience of the parties, the Tribunal must appoint a time and place for a hearing of the appeal²⁷. Except where the appellant requests a hearing in response to a proposal for a summary disposal of the appeal²⁸, the proper officer²⁹ must send to each party, the Information Commissioner and the relevant minister a notice informing him of the time and place of any hearing, which, unless the parties otherwise agree, must not be earlier than 14 days after the date on which the notice is sent³⁰.

Any such notice to a party must inform him that³¹ if, without furnishing the Tribunal with sufficient reason for his absence, he fails to appear at a hearing, having been duly notified of the hearing, the Tribunal may, if that party is the appellant, dismiss the appeal or, in any case, hear and determine the appeal, or any particular issue, in the party's absence and may make such order as to costs as it thinks fit³².

The Tribunal may postpone the time appointed for any hearing, or adjourn a hearing to such time as the Tribunal may determine, or alter the place appointed for any hearing; and, if it exercises any of these powers, it must notify each party previously notified of that hearing³³, and any person summoned to attend as a witness³⁴ at that hearing, of the revised arrangements³⁵.

For the purpose of hearing and determining appeals or any matter preliminary or incidental to an appeal, the Tribunal must sit at such times and in such places as the chairman or a deputy chairman may direct, and it may sit in two or more divisions³⁶.

For national security cases, the Tribunal is duly constituted for an appeal³⁷ in any case where the rules of procedure allow³⁸, if it consists of three of the persons (one of whom is designated by the Lord Chancellor to preside³⁹) designated by the Lord Chancellor⁴⁰ from time to time, from among the chairman and deputy chairmen appointed by him for the purpose of hearing such appeals⁴¹.

The determination of any question before the Tribunal as duly constituted is according to the opinion of the majority of the members hearing the appeal⁴².

The Tribunal may by summons require any person in the United Kingdom to attend as a witness at a hearing of an appeal at such time and place as may be specified in the summons⁴³ and at the hearing to answer any questions or produce any documents in his custody or under his control which relate to any matter in question in the appeal⁴⁴. No person is required to attend in obedience to such a summons unless he has been given at least 7 days' notice of the hearing or, if less than 7 days, he has informed the Tribunal that he accepts such notice as he has been given⁴⁵; and the Tribunal may upon the application of a person so summoned set the summons aside⁴⁶.

At any hearing by the Tribunal (other than a hearing for the summary disposal of an appeal⁴⁷), a party may conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose⁴⁸, and the relevant minister may appear also and be represented by any person whom he may appoint for the purpose⁴⁹.

All hearings by the Tribunal (including preliminary hearings) in relation to national security must be in private unless the Tribunal, with the consent of the parties and the relevant minister, directs that the hearing or any part of the hearing must take place in public⁵⁰. Where the Tribunal sits in private it may, with the consent of the parties and the relevant minister, admit to a hearing such persons on such terms and conditions as it considers appropriate⁵¹. Where the Tribunal considers it necessary for any party other than the relevant minister to be excluded from proceedings or any part of them in order to secure that information is not disclosed contrary to the interests of national security, it must direct accordingly, inform the person excluded of its reasons (to the extent that it is possible to do so without disclosing information contrary to the interests of national security), record those reasons in writing, and inform the relevant minister⁵². The relevant minister, or a person authorised to act on his behalf, may attend any hearing (other than a hearing for the summary disposal of an appeal⁵³) notwithstanding that it is in private⁵⁴.

Except where the appeal is determined in default of appearance⁵⁵, or where a party is excluded from proceedings⁵⁶, the Tribunal must at the hearing of an appeal give to each party and the relevant Minister an opportunity⁵⁷: (1) to address the Tribunal and to amplify orally written statements previously furnished, to give evidence and to call witnesses, and to put questions to any person giving evidence before the Tribunal⁵⁸; and (2) to make representations on the evidence (if any) and on the subject matter of the appeal generally but, where evidence is taken, such opportunity must not be given before the completion of the taking of evidence⁵⁹.

The Tribunal must conduct the proceedings in such manner as it considers appropriate in the circumstances for discharging its functions and must so far as appears to it appropriate seek to avoid formality in its proceedings⁶⁰.

Any irregularity resulting from failure to comply with any provision of the rules of procedure⁶¹, or of any direction of the Tribunal before the Tribunal has reached its decision, does not of itself render the proceedings void⁶². However, the Tribunal may, and it must so do if it considers that any person may have been prejudiced by that irregularity, give such directions or take such steps as it thinks fit before reaching its decision to cure or waive the irregularity, whether by amendment of any document, the giving of notice or otherwise⁶³.

As soon as practicable after the Tribunal has determined an appeal, the president must certify in writing that determination and sign and date the certificate⁶⁴, a copy of which must be sent

to the parties, to the relevant minister and to the Commissioner by the proper officer⁶⁵. The Tribunal must make arrangements for the publication of its determination but in doing so must have regard to the desirability of safeguarding the privacy of data subjects and commercially sensitive information, and the need to secure that information is not disclosed contrary to the interests of national security, and for those purposes may make any necessary amendments to the text of the certificate⁶⁶.

If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court⁶⁷. Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, it may deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court⁶⁸.

1 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11(1)(a). The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante. As to the notice of appeal see para 572 ante.

2 For the meaning of 'the relevant minister' see para 572 note 16 ante.

3 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11(1)(b). As to the notice in reply see para 572 ante.

4 Ie under the Data Protection Act 1998 s 28(6) (see para 572 text to note 4 ante): Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11(1).

5 Ibid r 11(1)(c). As to the respondent data controller's reply see para 572 ante. For the meaning of 'data controller' see para 506 note 7 ante

6 As to the Tribunal see para 521 ante.

7 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11(1). Subject to any rules of procedure, the jurisdiction of the Tribunal in respect of any appeal under the Data Protection Act 1998 s 28(4) (see para 572 text to notes 1-3 ante) or s 28(6) (see para 572 text to note 4 ante) must be exercised without notice by one or more persons designated under Sch 6 para 2(1) (see notes 40-41 infra): Sch 6 para 6(1). This provision applies only to the exercise of the jurisdiction of the Tribunal in accordance with the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11: r 3(2).

8 For the meaning of 'the appellant' see para 572 note 14 ante.

9 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11(2). The Tribunal must as soon as practicable notify the appellant and the relevant minister if, having given such a notification, it ceases to propose to determine the appeal in this way: r 11(7).

10 Ibid r 11(3).

11 Ibid r 11(4). Where an appellant requests a hearing, the Tribunal must, as soon as practicable and with due regard to the convenience of the appellant, appoint a time and place for a hearing accordingly: r 11(5). At any such hearing by the Tribunal, the appellant may conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose: r 21(2). The proper officer must send to the appellant a notice informing him of the time and place of any such hearing (which, unless the appellant otherwise agrees, must not be earlier than 14 days after the date on which the notice is sent), and the effect of a hearing in default of appearance (see r 22; and the text to note 32 infra): r 11(6).

12 Ie under ibid r 15 (see para 573 text to notes 6-17 ante) or r 18(2) (see note 25 infra): r 16(1)(a).

13 Ie under ibid r 20 (see the text to notes 43-46 infra): r 16(1)(b).

14 Ie under ibid r 27 (see the text to notes 64-66 infra): r 16(1)(c).

15 Ibid r 16(2).

16 See para 572 ante.

17 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 16(3).

18 Ibid r 16(4). The Tribunal may proceed before the period has expired, in accordance with r 17 (see the text and note 21 infra): r 16(4).

19 Ie in accordance with ibid r 17 (see the text and note 21 infra): r 16(5).

20 Ie where ibid r 11 applies: see the text and notes 1-11 supra.

21 Ie under ibid r 12 (see para 572 text to notes 43-48 ante): r 17(1). For these purposes, such an objection must be considered as a preliminary issue: r 17(4). Where, in such a case, the Tribunal is minded to overrule the relevant minister's objection, or to require him to provide a version of his notice in a form other than that in which he provided it under r 12(3)(b) (see para 572 text to note 47 ante), the Tribunal must invite the relevant minister to make oral representations: r 17(5). Where the Tribunal overrules such an objection by the relevant minister, or requires him to provide a version of his notice in a form other than that in which he provided it under r 12(3)(b), the Tribunal must not disclose, and the relevant minister must not be required to disclose, any material which was the subject of the unsuccessful objection if the relevant minister chooses not to rely upon it in opposing the appeal: r 17(6). However, where the Tribunal upholds the relevant minister's objection and either approves the version of his notice provided under r 12(3)(b) or requires him to provide a version of his notice in a form other than that in which he provided it under r 12(3)(b), r 7(3) (see para 572 text to notes 26-28 ante) applies to that version of the notice: r 17(7).

22 Ie under ibid r 16 (see the text and notes 12-19 supra): r 17(1). For these purposes, such an application must be considered as a preliminary issue or at the hearing of the substantive appeal: r 17(4).

23 Ibid r 17(2).

24 Ibid r 17(3).

25 Ibid r 18(1). Before determining any such matter, the Tribunal may, subject to r 16 (see the text and notes 12-19 supra), if it thinks fit direct any party to provide in writing further information about any matter relevant to the appeal within such time as the Tribunal may allow: r 18(2).

26 This provision is subject to ibid r 11 (see the text and notes 1-11 supra) and r 18 (see the text and note 25 supra): r 19(1).

27 Ibid r 19(1).

28 Ie under ibid r 11(5): see note 11 supra.

29 For the meaning of 'proper officer' see para 572 note 14 ante.

30 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 19(2). As to the Commissioner see para 518 ante.

31 Ibid r 19(3).

32 Ibid r 22.

33 Ie either under ibid r 19 (see the text to notes 28-35 supra) or under r 11(6) (see note 11 supra): r 19(4).

34 Ie witnesses summoned under ibid r 20 (see the text to notes 43-46 infra).

35 Ibid r 19(4).

36 Data Protection Act 1998 Sch 6 para 1.

37 Ie an appeal under ibid s 28(4) or s 24(6) (see para 572 text to notes 1-4 ante): Sch 6 para 3. As from 30 November 2005 (unless an earlier date is appointed: see the Freedom of Information Act 2000 s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o))), these provisions also apply to an appeal under the Freedom of Information Act 2000 s 60 (see para 614 post): see the Data Protection Act 1998 Sch 6 para 3 (prospectively substituted by the Freedom of Information Act 2000 s 61(1), Sch 4 para 2).

38 The general rule is that the jurisdiction of the Tribunal in respect of national security appeals is exercised without notice by one or more designated persons (see note 40 *infra*): Data Protection Act 1998 Sch 6 para 6(1). The Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (as amended), which constitute the rules of procedure made under the Data Protection Act 1998 Sch 6 para 7, reserves Sch 6 para 6(1) only for cases where the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 11 (see the text and notes 1-11 *supra*) applies: see r 3(2).

39 Data Protection Act 1998 Sch 6 para 3 (as substituted: see note 37 *supra*). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 *et seq.*

40 *Ie* such persons as are designated as capable of hearing appeals in relation to national security certificates under the Data Protection Act 1998 s 28(4) or s 28(6) (see para 572 *ante*): Sch 6 para 2(1) (prospectively amended by the Freedom of Information Act 2000 s 61(1), Sch 4 para 1). Such a designation may at any time be revoked by the Lord Chancellor: Data Protection Act 1998 Sch 6 para 2(2). The chairman and deputy chairmen are appointed by the Lord Chancellor under the Data Protection Act 1998 s 6(4)(a), (b).

41 *Ibid* Sch 6 para 2(1).

42 *Ibid* Sch 6 para 5.

43 For these purposes, the summoning of witnesses is subject to the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 16 (see the text and notes 12-19 *supra*) and r 20(3) (see the text to note 45 *infra*): r 20(1), (2). For the meaning of 'United Kingdom' see para 504 note 4 *ante*.

44 *Ibid* r 20(2). Evidence is subject to the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 16 (see the text and notes 12-19 *supra*) and r 26(2), (3) (see para 573 note 9 *ante*): r 20(1), (2). A person who has attended a hearing as a witness in obedience to a summons is entitled to such sum as the Tribunal considers reasonable in respect of his attendance at, and his travelling to and from, the hearing; and where the summons was issued at the request of a party such sum must be paid or tendered to him by that party: r 20(5).

45 *Ibid* r 20(3).

46 *Ibid* r 20(4).

47 *Ie* other than under *ibid* r 11 (see the text and notes 1-11 *supra*), except for any hearing by the Tribunal under r 11(5) (see note 11 *supra*), when the appellant may conduct his case himself or may appear and be represented by any person whom he may appoint for the purpose: r 21(1), (2).

48 *Ibid* r 21(1)(a). This provision is subject to r 17(2) (see the text to note 23 *supra*), r 23(3) (see the text to note 52 *infra*): r 21(1)(a).

49 *Ibid* r 21(1)(b).

50 *Ibid* r 23(1). Cf the Data Protection Tribunal (Enforcement Appeals) Rules 2000, SI 2000/189, r 19(1) (see para 570 text and note 28 *ante*).

51 Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206, r 23(2).

52 *Ibid* r 23(3).

53 *Ie* other than under *ibid* r 11 (see the text and notes 1-11 *supra*).

54 *Ibid* r 23(4).

55 *Ie* under *ibid* r 22: see the text to note 32 *supra*.

56 *Ie* under *ibid* r 23(3): see the text to note 52 *supra*.

57 *Ibid* r 24(1).

58 *Ibid* r 24(1)(a).

59 *Ibid* r 24(1)(b).

60 *Ibid* r 24(2).

61 *Ie* the Data Protection Tribunal (National Security Appeals) Rules 2000, SI 2000/206 (as amended).

62 Ibid r 29(1).

63 Ibid r 29(1). Clerical mistakes in any document recording or certifying a direction, decision or determination of the Tribunal or chairman, or errors arising in such a document from an accidental slip or omission, may at any time be corrected by the chairman, by certificate signed by him: r 29(2).

64 Ibid r 27(1). As to the president see para 572 note 13 ante. The certificate must include any material finding of fact, and the reasons for the decision, if and to the extent that it is possible to do so without disclosing information contrary to the interests of national security, and subject to r 16 (see the text and notes 12-19 supra): r 27(2). For these purposes (and for the purpose of r 27(4): see the text to note 66 infra), the disclosure of information is to be regarded as contrary to the interests of national security if it would indicate the existence or otherwise of any material: r 27(5).

65 Ibid r 27(3).

66 Ibid r 27(4). This provision is subject to r 16: see the text and notes 12-19 supra. See also note 64 supra.

67 Data Protection Act 1998 Sch 6 para 8(1).

68 Ibid Sch 6 para 8(2).

UPDATE

572-574 Appeals in relation to national security certificates

SI 2000/206 replaced: Information Tribunal (National Security Appeals) Rules 2005, SI 2005/13.

574 Hearing and determination of appeal in relation to a national security certificate

TEXT AND NOTES 37-41--Data Protection Act 1998 Sch 6 paras 2, 3 amended: Constitutional Reform Act 2005 Sch 4 paras 275, 406. See further s 85, Sch 14 Pt 3.

NOTE 37--Now as from 1 January 2005: SI 2004/3122.

NOTE 40--The Lord Chancellor's functions under the 1998 Act s 6(4) are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(iv) Powers of Entry and Inspection/575. Issue and execution of warrants.

(iv) Powers of Entry and Inspection

575. Issue and execution of warrants.

If a circuit judge is satisfied by information on oath supplied by the Information Commissioner¹ that there are reasonable grounds for suspecting that a data controller² has contravened or is contravening any of the data protection principles³, or that an offence under the Data Protection Act 1998⁴ has been or is being committed, and that evidence of the contravention or of the commission of the offence is to be found on any premises⁵, he may grant a warrant to

the Commissioner⁶. A warrant so issued authorises the Commissioner or any of his officers or staff at any time within seven days of the date of the warrant to enter the premises, to search them, to inspect, examine, operate and test any equipment found there which is used or intended to be used for the processing⁷ of personal data⁸ and to inspect and seize any documents or other material found there which may be such evidence⁹.

Unless the judge is satisfied that the case is one of urgency or that compliance with the following provisions would defeat the object of the entry¹⁰, he must not issue such a warrant unless he is satisfied:

- (1) that the Commissioner has given seven days' notice in writing to the occupier of the premises in question demanding access to them¹¹; and
- (2) that: (a) access was demanded at a reasonable hour and was unreasonably refused; or (b) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Commissioner or any of the Commissioner's officers or staff to permit the Commissioner or the officer or member of staff to do any of the things authorised by the warrant¹²; and
- (3) that the occupier, has, after the refusal, been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the judge on the question whether or not it should be issued¹³.

A warrant so issued must be executed at a reasonable hour unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed¹⁴. A person executing a warrant so issued may use such reasonable force as may be necessary¹⁵. If the person who occupies the premises in respect of which such a warrant is issued is present when the warrant is executed, he must be shown the warrant and supplied with a copy of it; and if he is not present, a copy must be left in a prominent place on the premises¹⁶.

A person seizing anything in pursuance of such a warrant must give a receipt for it if asked to do so¹⁷. Anything so seized may be retained for so long as is necessary in all the circumstances but the person in occupation of the premises in question must be given a copy of anything that is seized if he so requests and the person executing the warrant considers that it can be done without undue delay¹⁸.

A warrant so issued must be returned to the court from which it was issued either after being executed, or if it is not executed within the time authorised for its execution, and the person by whom any such warrant is executed must make an endorsement on it stating what powers have been exercised by him under the warrant¹⁹.

Any person is guilty of an offence if he either intentionally obstructs a person in the execution of a warrant so issued or fails without reasonable excuse to give any person executing such a warrant such assistance as he may reasonably require²⁰.

1 As to the Commissioner see para 518 ante.

2 For the meaning of 'data controller' see para 506 note 7 ante.

3 As to the data protection principles see para 507 et seq ante.

4 As to offences under the Data Protection Act 1998 see para 566 et seq ante.

5 For these purposes, 'premises' includes any vessel, vehicle, aircraft or hovercraft, and references to the occupier of any premises include references to the person in charge of any vessel, vehicle, aircraft or hovercraft: *ibid* s 50, Sch 9 para 13.

6 Data Protection Act 1998 Sch 9 para 1(1). A judge must not issue such a warrant in respect of any personal data processed for the special purposes unless a determination by the Commissioner made under s 45 (see para 564 ante) with respect to those data has taken effect: Sch 9 para 1(2).

As to additional powers of seizure from premises which apply to the power under Sch 9 para 1 see the Criminal Justice and Police Act 2001 s 50, Sch 1 Pt 1 para 65; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) para 890.

7 For the meaning of 'processing' (of information or data) see para 506 note 1 ante.

8 For the meanings of 'personal data' and 'data' see para 506 ante.

9 Data Protection Act 1998 Sch 9 para 1(3). As to search orders that may be granted relating to rights allegedly infringed under the law of confidence see para 491 ante.

10 Ibid Sch 9 para 2(2).

11 Ibid Sch 9 para 2(1)(a).

12 Ie to do any of the things referred to in ibid Sch 9 para 1(3) (see the text to notes 7-9 supra): Sch 9 para 2(1)(b).

13 Ibid Sch 9 para 2(1)(c). A judge who issues such a warrant must also issue two copies of it and certify them clearly as copies: Sch 9 para 3.

14 Ibid Sch 9 para 5.

15 Ibid Sch 9 para 4.

16 Ibid Sch 9 para 6.

17 Ibid Sch 9 para 7(1).

18 Ibid Sch 9 para 7(2).

19 Ibid Sch 9 para 11.

20 Ibid Sch 9 para 12.

UPDATE

575 Issue and execution of warrants

NOTES--1998 Act Sch 9 para 1 modified for purposes of Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(7) ENFORCEMENT/(iv) Powers of Entry and Inspection/576. Matters exempt from inspection and seizure.

576. Matters exempt from inspection and seizure.

The powers of inspection and seizure conferred by a warrant¹ are not exercisable in respect of:

- (1) personal data² which is exempt from any of the provisions of the Data Protection Act 1998³; or
- (2) any communication between a professional legal adviser and his client⁴ in connection with the giving of legal advice to the client with respect to his

obligations, liabilities or rights under the Data Protection Act 1998⁵, any copy or other record of any such communication or any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings⁶; or

(3) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of the Data Protection Act 1998⁷, and for the purposes of such proceedings, any copy or other record of any such communication or any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings⁸.

Heads (2) and (3) above do not apply to anything in the possession of any person other than the professional legal adviser or his client or to anything held with the intention of furthering a criminal purpose⁹.

If the person in occupation of any premises in respect of which a warrant is issued¹⁰ objects to the inspection or seizure under the warrant of any material on the grounds that it consists partly of matters in respect of which those powers are not exercisable, he must, if the person executing the warrant so requests, furnish that person with a copy of so much of the material as is not exempt from those powers¹¹.

1 Ie a warrant issued under the Data Protection Act 1998 s 50, Sch 9: see para 575 ante. As to search orders that may be granted relating to rights allegedly infringed under the law of confidence see para 491 ante.

2 For the meanings of 'personal data' and 'data' see para 506 ante.

3 Ie personal data which is exempt by virtue of the Data Protection Act 1998 s 28 (national security exemption: see para 546 ante): Sch 9 para 8.

4 For these purposes, references to the client of a professional legal adviser include references to any person representing such a client: *ibid* Sch 9 para 9(4).

5 *Ibid* Sch 9 para 9(1)(a).

6 *Ibid* Sch 9 para 9(2).

7 Ie including proceedings before the Information Tribunal: *ibid* Sch 9 para 9(1)(b). As to the Tribunal see para 521 ante.

8 *Ibid* Sch 9 para 9(1)(b), (2).

9 *Ibid* Sch 9 para 9(3).

10 Ie a warrant issued under *ibid* Sch 9: see para 575 ante.

11 *Ibid* Sch 9 para 10.

UPDATE

576 Matters exempt from inspection and seizure

NOTES--1998 Act Sch 9 para 9(1) modified for purposes of Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426: see reg 31, Sch 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(8) SPECIAL PROVISION MADE FOR ACCESS TO PATIENT INFORMATION/577. Control of patient information.

(8)

577. Control of patient information.

The Secretary of State has by regulations¹ made provision for confidential patient information² to be processed³ for medical purposes⁴ in specified circumstances⁵ provided that the processing has been approved by him or (in the case of medical research) approved both by him and by a research ethics committee⁶. The circumstances in which confidential patient information may be processed for medical purposes are as follows:

- (1) where the processing of confidential patient information for medical purposes is with a view to making the patient in question less readily identifiable from that information⁷;
- (2) where the processing of confidential patient information that relates to the present or past geographical locations of patients (including where necessary information from which patients may be identified) is required for medical research into the locations at which disease or other medical conditions may occur⁸;
- (3) where the processing of confidential patient information enables the lawful holder of that information to identify and contact patients for the purpose of obtaining consent to participate in medical research, or to use the information for the purposes of medical research, or to allow the use of tissue or other samples for medical purposes⁹;
- (4) where the processing of confidential patient information for medical purposes from more than one source is with a view to:
 - 44. (a) linking information from more than one of those sources;
 - 45. (b) validating the quality or completeness of confidential patient information or data derived from such information;
 - 46. (c) avoiding the impairment of the quality of data derived from confidential patient information by incorrect linkage or the unintentional inclusion of the same information more than once¹⁰;
- (5) where it relates to the audit, monitoring and analysing of the provision made by the health service for patient care and treatment¹¹;
- (6) where it relates to the granting of access to confidential patient information for one or more of the purposes in heads (1) to (5) above¹².

Special provisions apply to the processing of confidential patient information for medical purposes related to the diagnosis or treatment of neoplasia¹³ and in relation to communicable diseases and other risks to public health¹⁴.

Where the Secretary of State grants an approval¹⁵ which permits the transfer of confidential patient information between persons who may determine the purposes for which, and the manner in which, the information may be processed, he must¹⁶:

- (i) record in a register the name and address of each of those persons¹⁷; and
- (ii) include in each entry in the register¹⁸:

- 47. (A) a description of the confidential patient information to which the approval relates¹⁹;
- 48. (B) the medical purposes for which the information may be processed²⁰;
- 49. (C) under which of heads (1) to (6) above the information may be processed²¹; and
- 50. (D) such other particulars as the Secretary of State may consider appropriate to enter in the register²².

The Secretary of State must retain the particulars of each entry in the register for so long as confidential patient information may be processed under such an approval and for not less than 12 months after the termination of an approval²³; and he must, in such manner and to the extent to which he considers it appropriate, publish entries in the register²⁴.

Where a person is in possession of confidential patient information²⁵, he must not process that information more than is necessary to achieve the purposes for which he is permitted and, in particular, he must²⁶:

- (aa) so far as is practical to do so, remove from the information any particulars which identify the person to whom it relates which are not required for the purposes for which it is, or is to be, processed²⁷;
- (bb) not allow any person access to that information other than a person who, by virtue of his contract of employment or otherwise, is involved in processing the information for one or more of those purposes and is aware of the purpose or purposes for which the information may be processed²⁸;
- (cc) ensure that appropriate technical and organisational measures are taken to prevent unauthorised processing of that information²⁹;
- (dd) review at intervals not exceeding 12 months the need to process confidential patient information and the extent to which it is practicable to reduce the confidential patient information which is being processed³⁰; and
- (ee) on request by any person or body, make available information on the steps taken to comply with the Health Service (Control of Patient Information) Regulations 2002³¹.

Anything done by a person that is necessary for the purpose of processing confidential patient information in accordance with these provisions is taken to be lawfully done despite any obligation of confidence owed by that person in respect of it³². Any person who does not comply with a requirement imposed on him under these provisions³³ may be subject to a civil penalty³⁴.

Regulations³⁵ may not make provision requiring the processing of confidential patient information for any purpose if it would be reasonably practicable to achieve that purpose otherwise than pursuant to such regulations, having regard to the cost of and the technology available for achieving that purpose³⁶. Regulations³⁷ may not make provision for requiring the processing of confidential patient information solely or principally for the purpose of determining the care and treatment to be given to particular individuals³⁸.

Regulations made under these provisions may not make provision for or in connection with the processing of prescribed patient information in a manner that is inconsistent with any provision made by or under the Data Protection Act 1998³⁹.

¹ In the Health Service (Control of Patient Information) Regulations 2002, SI 2002/1438. Under the Health and Social Care Act 2001, the Secretary of State may by regulations make such provision for and in connection with requiring or regulating the processing of prescribed patient information for medical purposes as he considers necessary or expedient either in the interests of improving patient care, or in the public interest; s 60(1). As to the particular provision that may be made by such regulations see s 60(2). Section 60(1), (2) has

effect subject to s 60(3)-(6) (see the text and notes 35-39 *infra*): s 60(1). Before making any regulations, the Secretary of State must, to such extent as he considers appropriate in the light of the requirements of s 61 (see para 578 *post*), consult such bodies appearing to him to represent the interests of those likely to be affected by the regulations as he considers appropriate: s 60(7). Section 64(3) applies to any regulations under s 60 (except where they are made pursuant to s 60(4)(b): see note 36 head (2) *infra*); and no such regulations may be made (whether alone or with other provisions) unless a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 64(3). For general provision as to regulations under the Health and Social Care Act 2001 see s 64. As to the Secretary of State see para 521 note 2 *ante*.

2 For these purposes, 'patient information' means: (1) information (however recorded) which relates to the physical or mental health or condition of an individual, to the diagnosis of his condition or to his care or treatment; and (2) information (however recorded) which is to any extent derived, directly or indirectly, from such information, whether the identity of the individual in question is ascertainable from the information or not: *ibid* s 60(8). 'Confidential patient information' is information where: (a) the identity of the individual in question is ascertainable: (i) from that information; or (ii) from that information and other information which is in the possession of, or is likely to come into the possession of, the person processing that information; and (b) that information was obtained or generated by a person who, in the circumstances, owed an obligation of confidence to that individual: s 60(9). As to obligations imposed on health professionals by the law of confidence see paras 439-450 *ante*.

3 In *ibid* s 60, 'processing', in relation to information, means the use, disclosure or obtaining of the information or the doing of such other things in relation to it as may be prescribed for these purposes: s 60(10). 'Prescribed' means specified in, or determined in accordance with, regulations made by the Secretary of State under s 60: s 60(10). As to the regulations made see the Health Service (Control of Patient Information) Regulations 2002, SI 2002/1438; and notes 1-3 *supra*, 4-34 *infra*).

4 In the Health and Social Care Act 2001 s 60, 'medical purposes' means the purposes of any of the following: (1) preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of health and social care services; and (2) informing individuals about their physical or mental health or condition, the diagnosis of their condition or their care or treatment: s 60(10).

5 Ie the circumstances specified by the Health Service (Control of Patient Information) Regulations 2002, SI 2002/1438, reg 5, Schedule (see the text and notes 7-12 *infra*).

6 *Ibid* reg 5. 'Research ethics committee' means a local research ethics committee established or recognised by a health authority within its area or a multi-centre research ethics committee which is recognised by Secretary of State in respect of research carried out within five or more health authority areas or any other research ethics committee recognised by the Secretary of State: reg 1(2).

7 *Ibid* Sch para 1.

8 *Ibid* Sch para 2.

9 *Ibid* Sch para 3.

10 *Ibid* Sch para 4.

11 *Ibid* Sch para 5. 'Health service' has the same meaning as in the National Health Service Act 1977 (see HEALTH SERVICES vol 54 (2008) PARA 10: Health and Social Care Act 2001 s 60(10).

12 *Ibid* Sch para 6.

13 See *ibid* reg 2.

14 See *ibid* reg 3.

15 Ie under *ibid* reg 5: see the text and notes 1-6 *supra*.

16 *Ibid* reg 6(1).

17 *Ibid* reg 6(1).

18 *Ibid* reg 6(1), (2).

19 *Ibid* reg 6(2)(a).

20 *Ibid* reg 6(2)(b).

21 Ibid reg 6(2)(c).

22 Ibid reg 6(2)(d).

23 Ibid reg 6(3).

24 Ibid reg 6(4).

25 No person may process confidential patient information under the Health Service (Control of Patient Information) Regulations 2002, SI 2002/1438, unless he is a health professional or a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional: reg 7(2). For these purposes, 'health professional' has the same meaning as in the Data Protection Act 1998 s 69(1): see para 450 ante.

26 Health Service (Control of Patient Information) Regulations 2002, SI 2002/1438, reg 7(1).

27 Ibid reg 7(1)(a).

28 Ibid reg 7(1)(b).

29 Ibid reg 7(1)(c).

30 Ibid reg 7(1)(d).

31 Ibid reg 7(1)(e).

32 Ibid reg 4. As to such obligations of confidence see note 2 supra.

33 Ie a requirement imposed under *ibid* reg 7: reg 8(1). Similar requirements are imposed in relation to the diagnosis or treatment of neoplasia (see regs 2(4), (5)) and in relation to communicable diseases and other risks to public health (see regs 3(4), (5)): see the text and notes 13-14 supra.

34 The civil penalty must not exceed £5000: *ibid* reg 8(1). The Secretary of State may determine whether any person has not complied with such a requirement and he may assess whether it is appropriate to impose the maximum civil penalty, a lesser penalty or no penalty, having regard to the seriousness of any non-compliance, the circumstances of any person who has not complied and the need to ensure the compliance in respect of any such future requirements: reg 8(2). Any penalty so payable is recoverable by the Secretary of State as a civil debt: reg 8(3).

35 Ie regulations made under the Health and Social Care Act 2001 s 60(1).

36 *Ibid* s 60(3). Where regulations under s 60(1) make provision requiring the processing of prescribed confidential patient information, then the Secretary of State: (1) must, at any time within the period of one month beginning on each anniversary of the making of such regulations, consider whether any such provision could be included in regulations made at that time without contravening s 60(3); and (2) if he determines that any such provision could not be so included, must make further regulations varying or revoking the regulations made under s 60(1) to such extent as he considers necessary in order for the regulations to comply with that provision: s 60(4).

37 Ie regulations made under *ibid* s 60(1).

38 *Ibid* s 60(5).

39 *Ibid* s 60(6). This is expressed to be without prejudice to the operation of provisions made under the regulations in accordance with the Health and Social Care Act 2001 s 60(2)(c) for securing that, where prescribed patient information is processed by a person in accordance with the regulations, anything done by him in so processing the information is taken to be lawfully done despite any obligation of confidence owed by him in respect of it: s 60(6). As to the Data Protection Act 1998 see para 503 et seq ante.

UPDATE

577 Control of patient information

TEXT AND NOTES--2001 Act s 60 repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4. See now National Health Service Act 2006 s 251.

NOTE 6--A 'research ethics committee' means an ethics committee established or recognised in accordance with the Medicines for Human Use (Clinical Trials) Regulations 2004, SI 2004/1031, Pt 2 (regs 5-10) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 107) or any other committee established to advise on the ethics of research investigations in human beings, and recognised for that purpose by or on behalf of the Secretary of State or the National Assembly for Wales: SI 2002/1438 reg 1(2) (definition substituted by SI 2004/1031).

NOTE 14--SI 2002/1438 reg 3 amended: SI 2005/1622.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(8) SPECIAL PROVISION MADE FOR ACCESS TO PATIENT INFORMATION/578. The Patient Information Advisory Group.

578. The Patient Information Advisory Group.

The Secretary of State has by regulations¹ established a committee to be known as the Patient Information Advisory Group ('the Advisory Group')².

The Secretary of State may seek the views of the Advisory Group on such other matters connected with the processing³ of patient information⁴ or of any information (other than patient information) obtained or generated in the course of the provision of the health service⁵ as he considers appropriate⁶.

The Advisory Group must meet at least four times a year⁷, with a quorum consisting of at least half the membership⁸.

Where members of the Advisory Group hold differing views on any matter which falls for a decision a majority vote is decisive⁹. The outcome of such a vote must be formally recorded as votes for a particular view, decision or recommendation and votes against a particular view, decision or recommendation¹⁰.

The proceedings of the formal meetings of the Advisory Group, including minutes and any recommendations of the Advisory Group to the Secretary of State and the attendance list at the formal meetings of the Advisory Group, are publicly available¹¹.

1 Ie the Patient Information Advisory Group (Establishment) Regulations 2001, SI 2001/2836.

Before laying before Parliament a draft of any statutory instrument containing regulations under the Health and Social Care Act 2001 s 60(1) (see para 577 ante), or making any regulations pursuant to s 60(4)(b) (see para 577 note 36 head (2) ante), the Secretary of State must seek and have regard to the views of the Advisory Group on the proposed regulations: s 61(2). Regulations may, in particular, make provision as to: (1) the persons or bodies who are to be represented by members of the Advisory Group; (2) the terms of appointment of members; (3) the proceedings of the Advisory Group; and (4) the payment by the Secretary of State of such expenses incurred by the Advisory Group, and such allowances in respect of expenses incurred by members of the Advisory Group, as he may determine: s 61(4). The Secretary of State must publish, in such manner as he considers appropriate, any views which he receives from the Advisory Group pursuant to s 61(2): s 61(5). As to the Secretary of State see para 521 note 2 ante.

As to regulations under the Health and Social Care Act 2001 generally see s 64.

2 Ibid s 61(1); Patient Information Advisory Group (Establishment) Regulations 2001, SI 2001/2836, reg 2(1). The Advisory Group consists of not less than 12 nor more than 20 members: reg 2(2). As to the terms of appointment of members see reg 3. One of its members is designated by the Secretary of State as its chairman; however, for any period during which the chairman is unable to discharge his duties, the Advisory Group may by a majority vote elect a member of the Advisory Group to be vice chairman to perform them: reg 4. As to the Secretary of State's provision for the Advisory Group's expenses, accommodation and secretariat see regs 6, 7.

3 In the Health and Social Care Act 2001 s 61, 'processing' has the same meaning as it has for the purposes of s 60 (see para 577 note 3 ante): s 61(6).

4 In *ibid* s 61, 'patient information' has the same meaning as it has for the purposes of s 60 (see para 577 note 2 ante): s 61(6).

5 In *ibid* s 61, 'the health service' has the same meaning as in the National Health Service Act 1977 (see *HEALTH SERVICES* vol 54 (2008) PARA 10: Health and Social Care Act 2001 ss 60(10), 61(6).

6 *Ibid* s 61(3).

7 Patient Information Advisory Group (Establishment) Regulations 2001, SI 2001/2836, reg 5(1).

8 *Ibid* reg 5(7).

9 *Ibid* reg 5(5).

10 *Ibid* reg 5(6).

11 *Ibid* reg 5(8). A secretary to the Advisory Group, who is appointed by the Secretary of State and must be in attendance at all of its formally constituted meetings, has duties which include the taking of minutes at such meetings: reg 5(2), (3). In the event that the secretary to the Advisory Group is unable to attend a meeting, the chairman must nominate another person to act as the secretary: reg 5(4).

UPDATE

578 The Patient Information Advisory Group

TEXT AND NOTES 1-6--2001 Act s 61 repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4. See now National Health Service Act 2006 s 252 (substituted by the Health and Social Care Act 2008 s 158).

NOTE 2--SI 2001/2836 reg 3 amended: SI 2007/2009.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(9) DATA PROTECTION IN THE TELECOMMUNICATIONS SECTOR/579. Application of the data protection principles to telecommunications data.

(9)

579. Application of the data protection principles to telecommunications data.

The Data Protection Directive¹ is complemented by the Telecommunications Data Protection Directive² which provides for the processing of personal data and for the protection of privacy in the telecommunications sector³. The effect of both Directives may be restricted on grounds of national security, defence, public security, economic, financial or regulatory activities and state activities in preventing or detecting serious crime⁴.

1 *Ie* EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See para 503 ante.

2 *Ie* EC Council Directive 97/66 (OJ L24, 30.1.98, p 1). As from 31 October 2003, this Directive will be replaced by EC Council Directive 2002/58 (OJ L201, 31.7.2002, p 37) ('the Directive on Privacy and Electronic Communications', formerly known as 'the Communications Data Protection Directive').

3 See the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093 (amended by SI 2000/157), which implement EC Council Directive 97/66 (OJ L24, 30.1.98, p 1) (except for art 5 (see the text and note 4 infra) which is addressed by the Regulation of Investigatory Powers Act 2000: see para 580 post). See also the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731; the Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations 1998, SI 1998/3170, also made pursuant to EC Council Directive 97/66 (OJ L24, 30.1.98, p 1) (see note 2 supra); and TELECOMMUNICATIONS AND BROADCASTING. The Data Protection Tribunal is now known as the Information Tribunal: see the Freedom of Information Act 2000 s 18(2); and para 521 ante.

4 See EC Council Directive 95/46 (OJ L281, 23.11.95, p 31) art 13; EC Council Directive 97/66 (OJ L24, 30.1.98, p 1) art 5.

UPDATE

579 Application of the data protection principles to telecommunications data

NOTE 2--EC Council Directive 2002/58 implemented by Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 740). See also European Parliament and EC Council Directive 2006/24 implemented by Data Retention (EC Directive) Regulations 2009, SI 2009/859 (see TELECOMMUNICATIONS vol 97 (2010) PARAS 223, 224).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(9) DATA PROTECTION IN THE TELECOMMUNICATIONS SECTOR/580. Interception of communications.

580. Interception of communications.

It is an offence for a person intentionally and without lawful authority to intercept any communication in the course of its transmission by post or by public telecommunications systems except where the interception is undertaken by an authority in accordance with the prescribed statutory requirements¹. If and when such interception is undertaken without authority or justification it may be an infringement of confidence, and a contravention of data protection provisions, as well as a criminal offence².

It is also an offence for a person intentionally and without lawful authority, and otherwise than in circumstances in which his conduct is excluded from criminal liability by prescribed statutory requirements³, to intercept any communication in the course of its transmission by means of a private telecommunication system⁴. Even if criminal liability is excluded in such a case, such interception, without lawful authority, of a communication carried by a private telecommunication system (or by a public telecommunication system that is transmitting to or from apparatus comprised in a private telecommunication system) is actionable at the suit or instance of the sender or recipient, or intended recipient, of the communication⁵.

Regulations made under the Regulation of Investigatory Powers Act 2000 permit the monitoring of business communications (including those of employees) for lawful purposes, subject to sufficient notice being given of the monitoring to those who may use the systems being monitored⁶.

1 See the Regulation of Investigatory Powers Act 2000 s 1. This Act together with the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/2699 (see the text and note 6 infra) implements EC Council Directive 97/66 (OJ L24, 30.1.98, p 1) art 5. See further CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 506 et seq; TELECOMMUNICATIONS AND BROADCASTING. The

Regulation of Investigatory Powers Act 2000 provides safeguards for the users of telecommunications systems which are in accordance with rights guaranteed by the Human Rights Act 1998. As to the rights guaranteed by the Human Rights Act 1998 see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

2 The use of surveillance techniques is an obvious example where an intrusion into a person's privacy may give rise to liability in an action for breach of confidence unless the intrusion can be justified: *Venables v News Group Newspapers Ltd* [2001] Fam 430 at [81], [2001] 1 All ER 908 at [81], cited in *A v B* [2002] EWCA Civ 337 at [11](x), [2003] QB 195 at [11](x), [2002] 2 All ER 545 at [11](x) per Lord Woolf (obiter). The Regulation of Investigatory Powers Act 2000 establishes a tribunal to consider complaints concerning the use of surveillance, whether lawful or unlawful, where it is undertaken by public authorities: see s 65; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

See also *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 411, [1984] 1 WLR 892 at 895, CA (users of a telecommunications system take the risk of official interception or inefficiencies in the system but otherwise may regard their conversations as confidential), and at 412 and 897 (the unlawful interception of communications procured contrary to the Wireless Telegraphy Act 1949 may found rights of action in private law if the victim has suffered special damage). This authority appears to have survived the coming into effect of the Interception of Communications Act 1985 (see *R v Preston* [1994] 2 AC 130 at 150, [1993] 4 All ER 638 at 652, HL), but the Interception of Communications Act 1985 has been superseded by the Regulation of Investigatory Powers Act 2000.

3 See *ibid* s 1(6), which provides for a person either with a right to control the operation or use of such a system, or with the express or implied consent of such a person, to make the interception.

4 See *ibid* s 1(2).

5 See *ibid* s 1(3). This provision is a response to *Halford v United Kingdom* (1997) 24 EHRR 523, ECtHR.

6 See the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/2699, made in exercise of the powers conferred by the Regulation of Investigatory Powers Act 2000 ss 4(2), 78(5); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 508. When the monitoring of employees involves an interception which results in the recording of personal information, an employer needs to comply with both the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/2699, and the Data Protection Act 1998. In recognition of this and in exercise of the power given to him under the Data Protection Act 1998 s 51(3) (as amended) (see para 518 note 9 ante), the Information Commissioner has issued the Employment Practices Data Protection Code Part 3: Monitoring at Work (2003) to provide guidance in such matters. As to the Data Protection Act 1998 see para 503 et seq ante. As to the Commissioner see para 518 ante.

UPDATE

580 Application of the data protection principles to telecommunications data

NOTE 2--1949 consolidated in Wireless Telegraphy Act 2006.

NOTE 3--See *R v Stanford* [2006] All ER (D) 14 (Feb), CA; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 506.

NOTE 6--SI 2000/2699 amended: SI 2003/2426.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(9) DATA PROTECTION IN THE TELECOMMUNICATIONS SECTOR/581. Traffic and billing data.

581. Traffic and billing data.

Traffic and billing data¹ held by telecommunications providers² may be retained for specified purposes only³.

1 'Traffic data' means data which: (1) is in respect of traffic handled by a telecommunications network provider or a telecommunications service provider; (2) is processed to secure the connection of a call and held by the provider concerned; and (3) constitutes personal data whereof the data subject is a subscriber to, or user of, any publicly available telecommunications service or, in the case of a corporate subscriber, would constitute such personal data if that subscriber were an individual: Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, reg 6(1). 'Billing data' means certain classes of data that are held by a telecommunications network provider or a telecommunications service provider for purposes connected with the payment of sums falling to be paid by a subscriber, or by way of interconnection charges: reg 7(1).

2 'A telecommunications service provider' means a person who provides publicly available telecommunications services (whether or not he is also a telecommunications network provider); 'telecommunications services' means services the provision of which consists, in whole or in part, of the transmission and routing of signals on telecommunications networks, not being services by way of radio or television broadcasting; and 'telecommunications network provider' means a person who provides a public telecommunications network (whether or not he is also a telecommunications service provider): ibid reg 2(1).

3 See the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093 (as amended); and para 579 note 3 ante. The Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093, reg 32 confers a right to appeal to the Information Tribunal; and the procedure is regulated by the Data Protection Tribunal (National Security Appeals) (Telecommunications) Rules 2000, SI 2000/731 (see TELECOMMUNICATIONS AND BROADCASTING). As to the Tribunal see para 521 ante.

The Regulation of Investigatory Powers Act 2000 Pt I Ch II (ss 21-25) provides for the lawful acquisition of communications data by public authorities and for the lawful disclosure of the data to them: see s 21 (not yet in force); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 521. See also the Anti-Terrorism, Crime and Security Act 2001 Pt 11 (ss 102-107) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 429), pursuant to which the Secretary of State may: (1) issue a voluntary code, regulating the data retained by communications suppliers and the circumstances in which it may be disclosed (s 102); or (2) issue a direction to communications providers, the observance of which is mandatory (s 104). Section 104 ceases to have effect on 14 December 2003 unless an order renewing the power is made before the end of that period: see s 105. As to the Secretary of State see para 521 note 2 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/2. DATA PROTECTION/(10) UNAUTHORISED ACCESS TO DATA STORED ON COMPUTERS/582. The Computer Misuse Act 1990.

(10) UNAUTHORISED ACCESS TO DATA STORED ON COMPUTERS

582. The Computer Misuse Act 1990.

The Computer Misuse Act 1990 provides criminal sanctions for unauthorised access to or modification of any material held on computers, with additional sanctions if this is done with a view to the commission of a crime¹.

The extent to which the Data Protection Act 1998² (rather than the Computer Misuse Act 1990) imposes liability where a person uses authorised computer access to obtain information for an improper purpose is not clear³.

1 See the Computer Misuse Act 1990 ss 1, 2, 3; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) para 358 et seq.

2 See para 503 et seq ante.

3 The leading authority on this point under the Data Protection Act 1984 (repealed) was *DPP v Bignell* [1998] 1 Cr App Rep 1, DC (the retrieval of information from the police national computer, by someone with the proper authority under the Computer Misuse Act 1990, but at the request of others who were to use the data for non-police purposes, was a matter for the Data Protection Act 1984 or for police disciplinary proceedings rather

than the Computer Misuse Act 1990). However, dicta in *DPP v Bignell* supra which related to the Computer Misuse Act 1990 were disapproved in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Government of the United States of America* [2000] 2 AC 216 at 224-225, [1999] 4 All ER 1 at 7-8, HL (the Computer Misuse Act 1990 prevented someone with the authority to access data at a particular level on a computer system from accessing other data held on the same system for improper purposes).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES/583. General right of access.

3. THE

(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES

583. General right of access.

Any person making a request for information¹ to a public authority² is entitled (1) to be informed in writing by the public authority whether it holds information³ of the description specified in the request; and (2) if that is the case, to have that information communicated to him⁴. Where a public authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant⁵ of that requirement, the authority is not obliged to comply with the request unless it is supplied with that further information⁶. The information in respect of which the applicant is to be informed, or which is to be communicated, is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated, being an amendment or deletion that would have been made regardless of the receipt of the request⁷.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor⁸.

1 'Information' means information recorded in any form: Freedom of Information Act 2000 s 84. 'Request for information' is a reference to such a request which (1) is in writing; (2) states the name of the applicant and an address for correspondence; and (3) describes the information requested: s 8(1). A request is to be treated as made in writing where the text of the request (a) is transmitted by electronic means; (b) is received in legible form; and (c) is capable of being used for subsequent reference: s 8(2).

2 As to bodies, persons, or holders of office which are public authorities for the purposes of the Freedom of Information Act 2000 see s 3, Sch 1 (amended by the Learning and Skills Act 2000 s 73(1), (3)(a); the Transport Act 2000 ss 204, 274, Sch 14 Pt V para 30, Sch 31 Pt IV; the Health and Social Care Act 2001 s 67(1), Sch 5 Pt 1 para 14(1), Pt 3 para 18; the Criminal Justice and Police Act 2001 s 102, Sch 4 para 8; the Private Security Industry Act 2001 s 1(6), Sch 1 para 23; the National Health Service Reform and Health Care Professions Act 2002 ss 6(2), 20(6), 25(4), Sch 5 para 48, Sch 6 para 19, Sch 7 para 24; the Office of Communications Act 2002 s 1(10), Schedule para 22; the Financial Services and Markets Act 2000 (Dissolution of the Insurance Brokers Registration Council) (Consequential Provisions) Order 2001, SI 2001/1283; the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469; the Freedom of Information (Additional Public Authorities) Order 2002, SI 2002/2623; the Abolition of the Central Council for Education and Training in Social Work Order 2002, SI 2002/797; the Health Professions Order 2001, SI 2002/254; and, as from days to be appointed, by the Health (Wales) Act 2003 s 7(1), Sch 3 para 14; the Education Act 2002 s 215(1), Sch 21 para 127; the Police Reform Act 2002 s 107(1), Sch 7 para 23, Sch 8; and the National Health Service Reform and Health Care Professions Act 2002 s 19(7)).

As to the Lord Chancellor's power to amend the Freedom of Information Act 2000 Sch 1 see ss 4, 7 (both amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Public authorities may also be designated by order: Freedom of Information Act 2000 ss 3(1)(a)(ii), 5 (s 5 amended by the Transfer of Functions

(Miscellaneous) Order 2001, SI 2001/3500). See the Freedom of Information (Additional Public Authorities) Order 2002, SI 2002/2623. A publicly-owned company as defined by the Freedom of Information Act 2000 s 6 is also a public authority: s 3(1)(b). A company is a 'publicly-owned company' if it is wholly owned by the Crown, or it is wholly owned by any public authority listed in Sch 1 (as amended) other than a government department, or any authority which is listed only in relation to particular information: s 6(1). A company is wholly owned by the Crown if it has no members except Ministers of the Crown, government departments or companies wholly owned by the Crown, or persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and a company is wholly owned by a public authority other than a government department if it has no members except that public authority or companies wholly owned by that public authority, or persons acting on behalf of that public authority or of companies wholly owned by that public authority: s 6(2). 'Company' includes any body corporate: s 6(3). 'Government department' includes any body or authority exercising statutory functions on behalf of the Crown, but does not include the Security Service, the Secret Intelligence Service or the Government Communications Headquarters, or the National Assembly for Wales: s 84. 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 354): Freedom of Information Act 2000 ss 6(3), 84. 'Body' includes an unincorporated association: s 84. In certain circumstances the Freedom of Information Act 2000 has limited application to public authorities: see s 7 (amended by SI 2001/3500).

3 Information is held by a public authority if it is held by the authority, otherwise than on behalf of another person, or it is held by another person on behalf of the authority: Freedom of Information Act 2000 s 3(2).

4 Ibid s 1(1). A public authority is to be taken to have complied with head (1) in the text in relation to any information if it has communicated the information to the applicant in accordance with head (2): s 1(5). The duty of a public authority to comply with head (1) is referred to as 'the duty to confirm or deny': s 1(6). Where any provision of Pt II (ss 21-44) (see para 588 et seq post) states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either the provision confers absolute exemption, or in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, head (1) in the text does not apply: s 2(1). In respect of any information which is exempt information by virtue of any provision of Pt II, head (2) in the text does not apply if or to the extent that the information is exempt information by virtue of a provision conferring absolute exemption, or in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s 2(2). Sections 21, 23, 32, 34, 36 (so far as relating to information held by the House of Commons or the House of Lords), 40(1), 40(2) (so far as relating to cases where the first condition referred to in s 40(2) is satisfied by virtue of s 40(3)(a)(i) or (b)), 41, 44 are to be regarded as conferring absolute exemption for the purposes of s 2: s 2(3). 'Exempt information' means information which is exempt information by virtue of any provision of Pt II: s 84. See further para 588 et seq post.

5 'Applicant', in relation to a request for information, means the person who made the request: *ibid* s 84.

6 Ibid s 1(3).

7 Ibid s 1(4). Where any information communicated by a public authority to a person ('the applicant') under s 1 was supplied to the public authority by a third person, the publication to the applicant of any defamatory matter contained in the information is privileged unless the publication is shown to have been made with malice: s 79. As to the Lord Chancellor's power to amend or repeal enactments capable of preventing the disclosure of information under s 1 see s 75 (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

8 See the Freedom of Information Act 2000 s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

583-585 General right of access ... Refusal of request for information

Provisions now fully in force on 1 January 2005: SI 2004/3122.

583 General right of access

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733 Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--Freedom of Information Act 2000 Sch 1 further amended: Communications Act 2003 Sch 17 para 164; Licensing Act 2003 Sch 7; Local Government Act 2003 Sch 4 para 24; Courts Act 2003 Sch 8 para 392, Sch 10; Health and Social Care (Community Health and Standards) Act 2003 Sch 4 para 114, Sch 11 para 68, Sch 13 para 10, Sch 14 Pts 4, 7; Higher Education Act 2004 Sch 6 para 10; Health Protection Agency Act 2004 Sch 3 para 15; Energy Act 2004 Sch 1 para 18, Sch 10 para 18; Fire and Rescue Services Act 2004 Sch 1 para 95; Human Tissue Act 2004 Sch 2 para 27; Pensions Act 2004 Sch 12 para 79, Sch 13 Pt 1; Constitutional Reform Act 2005 Sch 11 para 34, Sch 18 Pt 5 (in force 1 October 2009: SI 2009/1604); Railways Act 2005 Sch 13 Pt 1; Education Act 2005 Sch 14 para 22; Gambling Act 2005 Sch 16 para 16; Public Services Ombudsman (Wales) Act 2005 Sch 6 para 72, Sch 7; Serious Organised Crime and Police Act 2005 Sch 4 para 160, Sch 17 Pt 2; Equality Act 2006 Sch 1 para 48, Sch 3 para 60, Sch 4; Health Act 2006 Sch 8 para 45; National Health Service (Consequential Provisions) Act 2006 Sch 1 para 211, Sch 4; National Lottery Act 2006 Sch 3; Natural Environment and Rural Communities Act 2006 Sch 11 Pt 1 para 153; Education and Inspections Act 2006 Sch 14 para 69, Sch 18 Pt 5; Police and Justice Act 2006 Sch 15 Pt 1(A); London Olympic Games and Paralympic Games Act 2006 Sch 1 para 23; Tribunals, Courts and Enforcement Act 2007 Sch 8 para 53, Sch 23 Pt 1; Consumers, Estate Agents and Redress Act 2007 Sch 1 para 35, Sch 8; Statistics and Registration Service Act 2007 Sch 4 Pt 1; Offender Management Act 2007 Sch 3 para 10, Sch 5 Pt 2; Pensions Act 2007 Sch 6 para 23; Local Government and Public Involvement in Health Act 2007 Sch 1 para 20, Sch 9 para 1(2)(q), Sch 13 para 54, Sch 18 Pts 9, 18; Legal Services Act 2007 Sch 15 para 32; Child Maintenance and Other Payments Act 2008 Sch 1 para 29; Regulatory Enforcement and Sanctions Act 2008 Sch 1 para 19; Housing and Regeneration Act 2008 Sch 8 para 77, Sch 9 para 28, Sch 16; Health and Social Care Act 2008 Sch 5 para 73, Sch 10 para 13, Sch 14 para 4, Sch 15 Pts 1, 6, 7; Climate Change Act 2008 Sch 1 para 33; Local Transport Act 2008 Sch 4 para 64; Parliamentary Standards Act 2009 Sch 1 para 27(1); Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 94, Sch 7 Pt 3; Marine and Coastal Access Act 2009 Sch 2 para 6, Sch 14 para 19, Sch 22 Pt 4 (Sch 14 para 19 not yet in force; Sch 22 Pt 4 in force in relation to Wales only: SI 2010/630); Apprenticeships, Skills, Children and Learning Act 2009 Sch 12 para 30; SI 2002/253; SI 2002/254; SI 2003/1882; SI 2003/1883; SI 2004/938 (amended by SI 2004/1870); SI 2004/1641; SI 2005/3593; SI 2005/3594; SI 2007/1388, SI 2008/1271; SI 2008/1967; and, in relation to Wales, SI 2004/803; SI 2005/3226; SI 2005/3238; SI 2005/3239; SI 2006/63; SI 2006/64; SI 2008/576; SI 2008/912; and SI 2008/960.

Definition of 'government department' amended: SI 2007/1388. Freedom of Information Act 2000 s 7 further amended: SI 2007/1388.

Days now appointed for amendments made by Health (Wales) Act 2003 Sch 3 para 14 (SI 2003/2660 (Wales); SI 2003/3064 (England)); Education Act 2002 Sch 21 para 127 (SI 2003/1667) (England)); Police Reform Act 2002 Sch 7 para 23, Sch 8 (SI 2004/913).

National Health Service Reform and Health Care Professions Act 2002 s 19(7), Sch 6 para 19 repealed: Local Government and Public Involvement in Health Act 2007 Sch 18 Pt 18.

SI 2002/2623 amended: SI 2005/3238.

There is no 'predominant purpose' test under which information held for multiple purposes, but other than to a minimal extent for any purpose outside journalism, art or literature, would have to be disclosed: *British Broadcasting Corp v Sugar* [2009] EWHC 2349 (Admin), [2010] 1 All ER 782. The words 'held for purposes other than' in the 2000 Act Sch 1 Pt VI mean 'held for purposes apart from and not including': *British Broadcasting Corp v Information Comr* [2009] EWHC 2348 (Admin), [2010] EMLR 6, [2009] All ER (D) 10 (Oct).

See *British Broadcasting Corp v Sugar; R (on the application of BBC) v Information Tribunal; R (on the application of Sugar) v Information Comr* [2007] EWHC 905 (Admin), (2007) Times, 22 May (appellant a public authority for purposes of information held otherwise than for purposes of journalism, art or literature).

NOTE 4--When considering a request for information about the handling of previous requests, a broad judgment on where the balance of public interest lies is required: *Home Office v Information Comr* [2009] EWHC 1611 (Admin), [2009] All ER (D) 50 (Jul). See also *HM Treasury v Information Comr* [2009] EWHC 1811 (Admin), [2010] 2 All ER 55.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES/584. Compliance with request for information.

584. Compliance with request for information.

A public authority¹ to whom a request for information² is made may, within the period for compliance³ with that request, give the applicant⁴ a notice in writing ('fees notice') stating that a fee of an amount specified in the notice is to be charged by the authority for complying with the request⁵. Where a fees notice has been given to the applicant, the public authority is not obliged to comply with the request for information unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant⁶. Any fee must be determined by the public authority in accordance with regulations made by the Lord Chancellor⁷.

A public authority must comply with a request for information promptly and in any event not later than the 20th working day⁸ following the date of receipt⁹. Where the authority has given a fees notice to the applicant and the fee is paid¹⁰, the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating the 20th working day following the date of receipt¹¹. The Lord Chancellor may by regulations provide that any reference to the 20th working day following the date of receipt is a reference to such other day, not later than the 60th working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations¹². Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely:

- (1) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant;
- (2) the provision to the applicant of a reasonable opportunity to inspect a record containing the information; and

(3) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority must so far as reasonably practicable give effect to that preference¹³. In determining whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so¹⁴. Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority must notify the applicant of the reasons for its determination¹⁵. A public authority may comply with a request by communicating information by any means which are reasonable in the circumstances¹⁶.

A public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit¹⁷. The Lord Chancellor may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them¹⁸. A public authority may charge for the communication of any information whose communication is not required because the cost of complying with the request for information exceeds the appropriate limit, and is not otherwise required by law, such fee as may be determined by the public authority in accordance with regulations made by the Lord Chancellor¹⁹. A public authority is not obliged to comply with a request for information if the request is vexatious²⁰. Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request²¹.

Where the appropriate records authority²² receives a request for information which relates to information which is, or if it existed would be, contained in a transferred public record²³, and either of two conditions²⁴ is satisfied in relation to any of that information, that authority must, within the period for compliance, send a copy of the request to the responsible authority²⁵. On receiving the copy, the responsible authority must, within such time as is reasonable in all the circumstances, inform the appropriate records authority of the determination required²⁶.

It is the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it²⁷.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor²⁸.

1 For the meaning of 'public authority' see para 583 note 2 ante.

2 For the meaning of 'information' and 'request for information' see para 583 note 1 ante.

3 As to time for compliance see text to note 9 infra.

4 For the meaning of 'applicant' see para 583 note 5 ante.

5 Freedom of Information Act 2000 s 9(1).

6 Ibid s 9(2).

7 Ibid s 9(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Regulations under the Freedom of Information Act 2000 s 9(3) may, in particular, provide (1) that no fee is to be payable in prescribed cases; (2) that any fee is not to exceed such maximum as may be specified in, or

determined in accordance with, the regulations; and (3) that any fee is to be calculated in such manner as may be prescribed by the regulations: s 9(4). Section 9(3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information: s 9(5). 'Prescribed' means prescribed by regulations made by the Lord Chancellor: s 84 (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

8 'Working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see *TIME* vol 97 (2010) PARA 321) in any part of the United Kingdom: Freedom of Information Act 2000 s 10(6).

9 *Ibid* s 10(1). 'The date of receipt' means the day on which the public authority receives the request for information, or if later, the day on which it receives the information referred to in s 1(3) (see para 583 ante): s 10(6). If, and to the extent that s 1(1)(a) would not apply if the condition in s 2(1)(b) were satisfied (see para 583 ante), or s 1(1)(b) would not apply if the condition in s 2(2)(b) were satisfied, the public authority need not comply with s 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this does not affect the time by which any notice under s 17(1) (see para 585 post) must be given: s 10(3).

10 *Ie* in accordance with *ibid* s 9(2) (see text to note 6 *supra*).

11 *Ibid* s 10(2).

12 *Ibid* s 10(4) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Regulations under the Freedom of Information Act 2000 s 10(4) may prescribe different days in relation to different cases, and confer a discretion on the Information Commissioner: s 10(5). As to the Commissioner see para 518 ante.

13 *Ibid* s 11(1).

14 *Ibid* s 11(2).

15 *Ibid* s 11(3).

16 *Ibid* s 11(4), which is expressed to be subject to s 11(1).

17 *Ibid* s 12(1). This does not exempt the public authority from its obligation to comply with s 1(1)(a) (see para 583 ante) unless the estimated cost of complying with s 1(1)(a) would exceed the appropriate limit: s 12(2). 'The appropriate limit' means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases: s 12(3). A public authority relying on a claim that s 12 applies to a request for information must, within the time for compliance, give the applicant a notice stating that fact: s 17(5).

18 *Ibid* s 12(4) (s 12(4), (5) amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). The Lord Chancellor may by regulations make provision for the purposes of the Freedom of Information Act 2000 s 12 as to the costs to be estimated and as to the manner in which they are to be estimated: s 12(5) (as so amended).

19 *Ibid* s 13(1) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Regulations under the Freedom of Information Act 2000 s 13(1) may, in particular, provide that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and that any fee is to be calculated in such manner as may be prescribed by the regulations: s 13(2). Section 13(1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information: s 13(3).

20 *Ibid* s 14(1). A public authority relying on a claim that s 14 applies to a request for information must, within the time for compliance, give the applicant a notice stating that fact: s 17(5). Section 17(5) does not apply where (1) the public authority is relying on a claim that s 14 applies; (2) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim; and (3) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under s 17(5) in relation to the current request: s 17(6). A notice under s 17(5) must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and contain particulars of the right conferred by s 50 (see para 590 post): s 17(7).

21 *Ibid* s 14(2).

22 'Appropriate records authority', in relation to a transferred public record, means (1) in a case falling within *ibid* s 15(4)(a) (see note 23 *infra*), the Public Record Office; and (2) in a case falling within s 15(4)(b) (see note 23 *infra*), the Lord Chancellor: s 15(5). For the meaning of 'transferred public record' see note 23 *infra*.

23 'Transferred public record' means a public record which has been transferred (1) to the Public Record Office; or (2) to another place of deposit appointed by the Lord Chancellor under the Public Records Act 1958: Freedom of Information Act 2000 s 15(4). For the meaning of 'public record' see CONSTITUTIONAL LAW AND HUMAN RIGHTS VOL 8(2) (Reissue) para 835.

24 The 'conditions' referred to are that the duty to confirm or deny is expressed to be excluded only by a provision of *ibid* Pt II (ss 21-44) not specified in s 2(3) (see para 583 note 4 ante), and that the information is exempt information only by virtue of a provision of Pt II not specified in s 2(3): s 15(2). As to the duty to confirm or deny see para 583 note 4 ante.

25 *Ibid* s 15(1). 'Responsible authority', in relation to a transferred public record, means in the case of a record transferred as mentioned in s 15(4)(a) or (b) (see note 22 *supra*) from a government department in the charge of a Minister of the Crown, the Minister of the Crown who appears to the Lord Chancellor to be primarily concerned, or in the case of a record transferred as mentioned in s 15(4)(a) or (b) from any other person, the person who appears to the Lord Chancellor to be primarily concerned: s 15(5). For the meaning of 'Minister of the Crown' see para 583 note 2 ante.

26 *Ie* by virtue of *ibid* s 66(3) or (4): s 15(3).

27 *Ibid* s 16(1). Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under s 45 (see para 587 post) is to be taken to comply with the duty imposed by s 16(1) in relation to that case: s 16(2).

28 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

583-585 General right of access ... Refusal of request for information

Provisions now fully in force on 1 January 2005: SI 2004/3122.

584 Compliance with request for information

NOTE 7--As to estimation of costs see the Freedom of Information (Appropriate Limit and Fees) Regulations 2004, SI 2004/3244, regs 4, 5; and as to the maximum fee for complying with a request for information see reg 6.

NOTE 12--See the Freedom of Information (Time for Compliance with Request) Regulations 2004, SI 2004/3364; and the Freedom of Information (Time for Compliance with Request) Regulations 2009, SI 2009/1369.

NOTE 17--The appropriate limit for the purposes of the Freedom of Information Act 2000 s 12(1), (2) is (1) £600 for public authorities listed in Sch 1 Pt 1 (paras 1-6), and (2) £450 for other public authorities: SI 2004/3244 reg 3.

NOTE 19--As to the maximum fee see *ibid* reg 7.

585. Refusal of request for information.

A public authority¹ which, in relation to any request for information², is to any extent relying on a claim that any of certain specified provisions³ relating to the duty to confirm or deny⁴ is relevant to the request or on a claim that information is exempt information⁵ must, within the time for compliance⁶, give the applicant⁷ a notice which (1) states that fact, (2) specifies the exemption in question, and (3) states (if that would not otherwise be apparent) why the exemption applies⁸. Where

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim (i) that any of certain specified provisions⁹ which relates to the duty to confirm or deny is relevant to the request, or (ii) that the information is exempt information¹⁰, and
- (b) at the time when the notice is given to the applicant, the public authority (or responsible authority¹¹) has not yet reached a decision as to the application of specified provisions¹²,

the notice must indicate that no decision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached¹³. A public authority which, in relation to any request for information, is to any extent relying on a claim that a specified provision¹⁴ applies must, either in the notice¹⁵ or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information¹⁶.

Specific provision is made as to the discretionary refusal of requests for the disclosure of information contained in historical records¹⁷.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor¹⁸.

1 For the meaning of 'public authority' see para 583 note 2 ante.

2 For the meaning of 'information' and 'request for information' see para 583 note 1 ante.

3 Ie the Freedom of Information Act 2000 Pt II (ss 21-44) (see para 588 et seq post).

4 As to 'the duty to confirm or deny' see para 583 ante.

5 For the meaning of 'exempt information' see para 583 note 4 ante.

6 As to the time for compliance see the Freedom of Information Act 2000 s 10(1); and para 584 ante.

7 For the meaning of 'applicant' see para 583 note 5 ante.

8 Freedom of Information Act 2000 s 17(1). A public authority is not obliged to make a statement under head (3) in the text if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information: s 17(4). A notice under s 17(1) must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and contain particulars of the right conferred by s 50 (see para 609 post): s 17(7).

9 Ie any provision of ibid Pt II not specified in s 2(3) (see para 583 ante).

10 Ie by virtue of a provision not specified in ibid s 2(3) (see para 583 ante).

11 ie in a case falling within *ibid* s 66(3) or (4).

12 ie *ibid* s 2(1)(b) or (2)(b) (see para 583 ante).

13 *Ibid* s 17(2).

14 ie *ibid* s 2(1)(b) or (2)(b).

15 ie under *ibid* s 17(1).

16 *Ibid* s 17(3). A public authority is not obliged to make such a statement if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information: s 17(4). A notice under s 17(3) must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and contain particulars of the right conferred by s 50 (see para 609 post): s 17(7).

17 See *ibid* ss 65, 66. For the meaning of 'historical record' and as to the commencement of Pt VI (ss 62-67) see para 590 note 24 post.

18 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

583-585 General right of access ... Refusal of request for information

Provisions now fully in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES/586. Publication schemes.

586. Publication schemes.

It is the duty of every public authority¹ (1) to adopt and maintain a scheme which relates to the publication of information² by the authority and is approved by the Information Commissioner³ ('publication scheme'); (2) to publish information in accordance with its publication scheme; and (3) from time to time to review its publication scheme⁴. A publication scheme must specify (a) classes of information which the public authority publishes or intends to publish; (b) the manner in which information of each class is, or is intended to be, published; and (c) whether the material is, or is intended to be, available to the public free of charge or on payment⁵. In adopting or reviewing a publication scheme, a public authority must have regard to the public interest in allowing public access to information held by the authority, and in the publication of reasons for decisions made by the authority⁶. A public authority is to publish its publication scheme in such manner as it thinks fit⁷. The Commissioner may, when approving a scheme, provide that his approval is to expire at the end of a specified period⁸. Where the Commissioner has approved the publication scheme of any public authority, he may at any time give notice to the public authority revoking his approval of the scheme as from the end of the period of six months beginning with the day on which the notice is given⁹. Where the Commissioner refuses

to approve a proposed publication scheme, or revokes his approval of a publication scheme, he must give the public authority a statement of his reasons for doing so¹⁰.

The Commissioner may from time to time approve, in relation to public authorities falling within particular classes, model publication schemes prepared by him or by other persons¹¹. Where a public authority falling within the class to which an approved model scheme relates adopts such a scheme without modification, no further approval of the Commissioner is required so long as the model scheme remains approved, and where such an authority adopts such a scheme with modifications, the approval of the Commissioner is required only in relation to the modifications¹². The Commissioner may, when approving a model publication scheme, provide that his approval is to expire at the end of a specified period¹³. Where the Commissioner has approved a model publication scheme, he may at any time publish, in such manner as he thinks fit, a notice revoking his approval of the scheme as from the end of the period of six months beginning with the day on which the notice is published¹⁴. Where the Commissioner refuses to approve a proposed model publication scheme on the application of any person, he must give the person who applied for approval of the scheme a statement of the reasons for his refusal¹⁵.

- 1 For the meaning of 'public authority' see para 583 note 2 ante.
- 2 For the meaning of 'information' see para 583 note 1 ante.
- 3 As to the Commissioner see para 518 ante.
- 4 Freedom of Information Act 2000 s 19(1). Section 19(1)-(4) is in force so far as relating to the approval of publication schemes and in relation to certain specified public authorities: s 87(1)(b); Freedom of Information Act 2000 (Commencement No 2) Order 2002, SI 2002/2812.
- 5 Freedom of Information Act 2000 s 19(2). As to commencement see note 4 supra.
- 6 Ibid s 19(3). As to commencement see note 4 supra.
- 7 Ibid s 19(4). As to commencement see note 4 supra.
- 8 Ibid s 19(5).
- 9 Ibid s 19(6).
- 10 Ibid s 19(7).
- 11 Ibid s 20(1).
- 12 Ibid s 20(2). Where the Commissioner refuses to approve any modifications under s 20(2), he must give the public authority a statement of the reasons for his refusal: s 20(6).
- 13 Ibid s 20(3).
- 14 Ibid s 20(4). Where the Commissioner revokes his approval of a model publication scheme, he must include in the notice under s 20(4) a statement of his reasons for doing so: s 20(7).
- 15 Ibid s 20(5).

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

586 Publication schemes

NOTE 4--2000 Act s 19(1)-(4) in force for all purposes: SI 2003/2603, SI 2004/3122. SI 2002/2812 amended: SI 2005/3239.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES/587. Offence of altering records with intent to prevent disclosure.

587. Offence of altering records with intent to prevent disclosure.

Where a request for information has been made to a public authority¹, and the applicant would have been entitled², subject to payment of any fee, to communication of any information, the public authority, and any person who is employed by, is an officer of, or is subject to the direction of, the public authority is guilty of an offence if it or he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled³. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale⁴.

1 As to public authorities see para 583 note 2 ante.

2 Ie under the Freedom of Information Act 2000 s 1 (see para 583 ante) or the Data Protection Act 1998 s 7 (see para 525 ante).

3 Freedom of Information Act 2000 s 77(1), (2). Section 77 comes into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor.

4 Ibid s 77(3). Proceedings may be instituted only by the Information Commissioner or by or with the consent of the Director of Public Prosecutions: s 77(4). As to the Information Commissioner see para 518 ante. As to the standard scale see para 566 note 34 ante.

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

587 Offence of altering records with intent to prevent disclosure

NOTE 3--Freedom of Information Act 2000 s 77 now in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(1) STATUTORY RIGHT OF ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES/587A. Re-use of public sector information.

587A. Re-use of public sector information.

1. Permitting re-use

A public sector body¹ may permit re-use². However, this does not apply (1) to a document where the activity of supplying the document is one which falls outside the public task of the public sector body, or where a third party owns relevant intellectual property rights³ in the document⁴; (2) to a document unless it has been identified by the public sector body as being available for re-use, has been provided to the applicant⁵, or is otherwise accessible by means other than by making a request for it within the meaning of the specified enactments⁶; (3) to documents held by (a) public service broadcasters⁷ and their subsidiaries⁸, and other bodies and their subsidiaries for the purposes of the provision of programme services⁹ or the conduct of any activities which a public service broadcaster is required or empowered to provide or to engage in by or under any enactment or other public instrument¹⁰; (b) educational and research establishments, such as schools, universities, archives, libraries, and research facilities including organisations established for the transfer of research results¹¹; or (c) cultural establishments, such as museums, libraries, archives, orchestras, and opera, ballet and theatre establishments¹²; or (4) in any situation in which a person is under a legal obligation to prove an interest in order to gain access to documents¹³.

1 For the purposes of the Re-use of Public Sector Information Regulations 2005, SI 2005/1515, each of the following is a public sector body: (1) a minister of the Crown (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 354 et seq); (2) a government department; (3) the House of Commons (see PARLIAMENT vol 78 (2010) PARA 892 et seq); (4) the House of Lords (see PARLIAMENT vol 78 (2010) PARA 828 et seq); (5) the Northern Ireland Assembly Commission; (6) Scottish Ministers; (7) the Scottish Parliament; (8) the Scottish Parliamentary Corporate Body; (9) the National Assembly for Wales (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq); (10) a local authority (see LOCAL GOVERNMENT vol 69 (2009) PARA 23); (11) a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 (see FIRE SERVICES vol 18(2) (Reissue) PARA 24-26) or a scheme to which s 4 (see FIRE SERVICES vol 18(2) (Reissue) PARA 24-26) applies; (12) the Fire Authority for Northern Ireland; (13) a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139); (14) a police authority established under the Police (Scotland) Act 1967 s 2; (15) the Northern Ireland Policing Board; (16) an authority established under the Local Government Act 1985 s 10 (see LOCAL GOVERNMENT vol 69 (2009) PARA 17); (17) a joint authority established by Pt IV (ss 23-42) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq); (18) any body established pursuant to an order under s 67 (see LOCAL GOVERNMENT vol 69 (2009) PARA 17); (19) the Broads Authority (see WATER AND WATERWAYS vol 101 (2009) PARAS 734-736); (20) any joint board the constituent members of which consist of any of the bodies specified in heads (10), (11), (13), (14), (16), (17), (18) and (19) above; (21) a national park authority established by an order under the Environment Act 1995 s 63 (see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526); (22) the Receiver for the Metropolitan Police District (see POLICE); (23) a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and (a) financed wholly or mainly by another public sector body; (b) subject to management supervision by another public sector body; or (c) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another public sector body; and (24) an association of or formed by one or more public sector bodies: SI 2005/1515 reg 3(1). 'Government department' includes a Northern Ireland department, the Northern Ireland Court Service and any other body or authority exercising statutory functions on behalf of the Crown: reg 2.

In the application of SI 2005/1515 to England, 'local authority' means (i) a county council, a district council, a London borough council, a parish council or the Council of the Isles of Scilly; (ii) the Common Council of the City of London in its capacity as a local authority or police authority; and (iii) the Greater London Authority or a functional body within the meaning of the Greater London Authority Act 1999 (see LONDON GOVERNMENT); and in the application of SI 2005/1515 to Wales, 'local authority' means a county council, county borough council or community council: SI 2005/1515 reg 3(2), (3). As to areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq.

2 Ibid reg 7(1). 'Re-use' means the use by a person of a document held by a public sector body for a purpose other than the initial purpose within that public sector body's public task for which the document was produced, but does not include the transfer for use of a document within a public sector body for the purpose of carrying out its own public task or the transfer for use of a document from one public sector body to another for the purpose of either public sector body carrying out its public task: reg 4. 'Document' means any content, including any part of such content, whether in writing or stored in electronic form as a sound, visual or audio-

visual recording, other than a computer program; 'content' means information recorded in any form; and 'writing' includes text which is transmitted by electronic means, received in legible form and capable of being used for subsequent reference: reg 2.

Where a public sector body permits re-use, it must do so in accordance with regs 11-16 (see PARA 587A.3): reg 7(2).

3 'Relevant intellectual property rights' means any of (1) copyright within the meaning of the Copyright, Designs and Patents Act 1988 s 1 (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 57); (2) database right within the meaning of the Copyright and Rights in Database Regulations 1997, SI 1997/3032, reg 13 (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 736); (3) publication right within the meaning of the Copyright and Related Rights Regulations 1996, SI 1996/2967, reg 16 (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 497); and (4) rights in performances, meaning the rights conferred by the 1988 Act Pt II (ss 180-212) (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 604 et seq): SI 2005/1515 reg 2.

4 Ibid reg 5(1).

5 'Applicant' means any person who makes a request for re-use of a document to a public sector body: ibid reg 2.

6 Ibid reg 5(2). The specified enactments are the Data Protection Act 1988 (see PARA 503 et seq), the Freedom of Information Act 2000 (see PARA 583 et seq) and the Environmental Information Regulations 2004, SI 2004/3391 (see WATER AND WATERWAYS vol 101 (2009) PARA 681): SI 2005/1515 reg 5(2)(c).

7 For these purposes 'public service broadcaster' has the same meaning as in the Communications Act 2003 s 264(12) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 266): SI 2005/1515 reg 5(4).

8 For these purposes 'subsidiary' has the same meaning as in the Companies Act 1985 s 258 (see now Companies Act 2006 s 1162, Sch 7) (see COMPANIES vol 14 (2009) PARAS 26, 27): SI 2005/1515 reg 5(4).

9 For these purposes 'programme services' has the same meaning as in the 2003 Act s 405(1) (see TELECOMMUNICATIONS vol 97 (2010) PARA 16): SI 2005/1515 reg 5(4).

10 Ibid reg 5(3)(a).

11 Ibid reg 5(3)(b).

12 Ibid reg 5(3)(c).

13 Ibid reg 5(5).

2. Requests for re-use

A request for re-use¹ must be in writing², state the name of the applicant³ and an address for correspondence, specify the document⁴ requested and state the purpose for which the document is to be re-used⁵. A public sector body⁶ must respond to a request for re-use⁷ promptly and in any event before the end of the twentieth working day⁸ beginning with the day after receipt⁹. Where documents requested for re-use are extensive in quantity or the request raises complex issues the public sector body may extend the period for responding to the request by such time as is reasonable in the circumstances¹⁰ but must, before the end of the twentieth working day beginning with the day after receipt of the request, notify the applicant in writing that no decision on re-use has yet been reached and of an estimated date by which the public sector body expects to respond to the request for re-use¹¹.

Where a public sector body refuses a request for re-use, it must notify¹² the applicant in writing of the reason for refusal¹³. Where such a request is refused because a third party owns relevant intellectual property rights¹⁴ in the document in question¹⁵, the notification must identify, where known, the name of the person who owns the relevant intellectual property rights or from whom the public sector body obtained the document¹⁶.

1 For the meaning of 're-use' see PARA 587A.1 NOTE 2.

2 For the meaning of 'writing' see PARA 587A.1 NOTE 2.

3 For the meaning of 'applicant' see PARA 587A.1 NOTE 5.

4 For the meaning of 'document' see PARA 587A.1 NOTE 2.

5 Re-use of Public Sector Information Regulations 2005, SI 2005/1515, reg 6.

6 For the meaning of 'public sector body' see PARA 587A.1.

7 For these purposes 'responding to a request for re-use' means (1) refusing the request for re-use; (2) making the requested document available to the applicant for re-use; or (3) where conditions are to be imposed on re-use pursuant to SI 2005/1515 reg 12 (see PARA 587A.3 TEXT AND NOTE 11), finalising the offer to the applicant of the conditions on which re-use will be permitted: reg 8(4).

8 'Working day' means any day other than a Saturday or a Sunday, Christmas Day, Good Friday or any day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in any part of the United Kingdom: SI 2005/1515 reg 2.

9 Ibid reg 8(1). Where possible and appropriate, a public sector body must ensure that the procedure for processing a request for re-use in accordance with SI 2005/1515 is capable of being carried out by electronic means: reg 10.

10 Ibid reg 8(2).

11 Ibid reg 8(3).

12 Such a notification must contain a reference to the means of redress available to the applicant: *ibid* reg 9(3).

13 Ibid reg 9(1). However, where a public sector body refuses a request for re-use because SI 2005/1515 does not apply to the document by virtue of reg 5(3) (see PARA 587A.1 TEXT AND NOTES 7-12) it is not obliged to comply with regs 8(1) or 9(1): reg 9(2).

14 For the meaning of 'relevant intellectual property rights' see PARA 587A.1 NOTE 3.

15 Ie where SI 2005/1515 does not apply to the document by virtue of reg 5(1)(b): see PARA 587A.1 TEXT AND NOTES 3, 4.

16 Ibid reg 9(4).

3. Conditions relating to re-use

A public sector body¹ may make a document² available³ to an applicant⁴ in the format and language in which it exists on the date of response to the request for re-use⁵. Where possible and appropriate, a public sector body must make a document available for re-use by electronic means⁶. However, a public sector body is not obliged⁷ to (1) create or adapt a document in order to comply with a request for re-use⁸; (2) provide an extract from a document where to do so would involve disproportionate effort⁹; or (3) continue to produce a certain type of document for the purposes of re-use by another person¹⁰.

A public sector body may impose conditions on re-use¹¹.

A public sector body must not enter into an exclusive arrangement¹² with any person including an applicant¹³. However, such a body may enter into an exclusive arrangement where necessary for the provision of a service in the public interest¹⁴. Any exclusive arrangement which exists on 1 July 2005¹⁵ and which is not necessary for the provision of such a service must be terminated at the earlier of the date on which it comes to an end in accordance with its terms, or 31 December 2008¹⁶.

A public sector body may charge for allowing re-use¹⁷. The total income from any such charge must not exceed the sum of the cost of collection, production, reproduction and dissemination of documents¹⁸ and a reasonable return on investment¹⁹. Any charges for re-use must, so far as

is reasonably practicable, be calculated in accordance with the accounting principles applicable to the public sector body from time to time, and on the basis of a reasonable estimate of the demand for documents over the appropriate accounting period²⁰. Where a public sector body charges for re-use it must, so far as is reasonably practicable, establish standard charges²¹.

A public sector body must ensure that (a) any applicable conditions for re-use; (b) any standard charges for re-use²²; (c) a list of main documents available for re-use²³; and (d) details of the means of redress available to an applicant relating to any decision or practice affecting him²⁴ are made available to the public²⁵.

- 1 For the meaning of 'public sector body' see PARA 587A.1 NOTE 1.
- 2 For the meaning of 'document' see PARA 587A.1 NOTE 2.
- 3 Ie pursuant to the Re-use of Public Sector Information Regulations 2005, SI 2005/1515, reg 8(4)(b) or (c) (see PARA 587A.2 NOTE 7 heads (2) and (3)).
- 4 For the meaning of 'applicant' see PARA 587A.1 NOTE 5.
- 5 SI 2005/1515 reg 11(1). As to responses for requests for re-use see reg 8; and PARA 587A.2 TEXT AND NOTES 1-11. For the meaning of 're-use' see PARA 587A.1 NOTE 2.
- 6 Ibid reg 11(2).
- 7 Ie by virtue of SI 2005/1515.
- 8 Ibid reg 11(3)(a).
- 9 Ibid reg 11(3)(b).
- 10 Ibid reg 11(3)(c).
- 11 Ibid reg 12(1). Where conditions are imposed they must not unnecessarily restrict the way in which a document can be re-used or competition: reg 12(2). Any conditions imposed must not discriminate between applicants who make a request for re-use for comparable purposes: reg 13(1). If a public sector body which holds a document wishes to re-use it for activities which fall outside of the scope of its public task, the same conditions apply to that re-use as would apply to re-use by any other applicant for comparable purposes: reg 13(2).
- 12 For these purposes 'exclusive arrangement' means a contract or other arrangement granting an exclusive right to re-use a document: ibid reg 14(6).
- 13 Ibid reg 14(1).
- 14 Ibid reg 14(2). The validity of the reason for granting such an exclusive arrangement must be reviewed at least once every three years: reg 14(3). Any such exclusive arrangement entered into on or after 31 December 2003 must be published by the public sector body: reg 14(4).
- 15 Ie the date on which SI 2005/1515 came into force.
- 16 Ibid reg 14(5).
- 17 Ibid reg 15(1).
- 18 Ibid reg 15(2)(a). A public sector body must not charge an applicant for costs incurred in respect of the activities mentioned under reg 15(2)(a) in respect of a request for re-use if the same applicant had been charged in respect of the same activities by that public sector body for access to the same document under information access legislation: reg 15(4). 'Information access legislation' means any legislation governing access to information including the Data Protection Act 1998 (see PARA 503 et seq), the Freedom of Information Act 2000 (see PARA 583 et seq) and the Environmental Information Regulations 2004, SI 2004/3391 (see WATER AND WATERWAYS vol 101 (2009) PARA 681): SI 2005/1515 reg 2.
- 19 Ibid reg 15(2)(b).
- 20 Ibid reg 15(3).

21 Ibid reg 15(5). If requested to do so by an applicant, a public sector body must specify in writing the basis on which a standard charge has been calculated, and where a standard charge for re-use has not been established, must specify in writing the factors that will be taken into account in calculating the charge: reg 15(6), (7). For the meaning of 'writing' see PARA 587A.1 NOTE 2.

22 Ie any standard charges established under ibid reg 15(5).

23 So far as is reasonably practicable, a public sector body must ensure that potential applicants are able to search the list of documents by electronic means: ibid reg 16(3).

24 Ie affecting him under SI 2005/1515.

25 Ibid reg 16(1). A public sector body must, where possible and appropriate, make the information specified in reg 16(1) available to the public by electronic means: reg 16(2).

4. Complaints

A public sector body¹ must establish an internal complaints procedure for determining complaints relating to its actions². Where a person believes that a public sector body has failed to comply with a relevant requirement³, he may complain in writing⁴ to the public sector body in accordance with its internal complaints procedure⁵. A public sector body must determine any such complaint within a reasonable time and thereafter notify⁶ the person of its determination without delay⁷.

Where a person has exhausted an internal complaints procedure in respect of any complaint made, or where the public sector body has failed to deal with such a complaint within a reasonable time, the person may refer that complaint to the Office of Public Sector Information⁸, which must notify⁹ the person and the relevant public sector body of its recommendations¹⁰.

Where a specified body¹¹ is the subject of a complaint¹² and a person has exhausted the body's internal complaints procedure in respect of that complaint, or where the specified body has failed to deal with such a complaint within a reasonable time, the person may refer that complaint to the Advisory Panel on Public Sector Information¹³, which must notify¹⁴ the person, the relevant public sector body and the Office of Public Sector Information of its recommendation¹⁵.

1 For the meaning of 'public sector body' see PARA 587A.1 NOTE 1.

2 Ie relating to its actions under the Re-use of Public Sector Information Regulations 2005, SI 2005/1515: reg 17(1).

3 Ie with any requirement of SI 2005/1515.

4 For the meaning of 'writing' see PARA 587A.1 NOTE 2.

5 SI 2005/1515 reg 17(2).

6 Any such notification must be in writing and must give reasons for the determination: ibid reg 17(4).

7 Ibid reg 17(3).

8 Ibid reg 18(1). Any such complaint must (1) be in writing; (2) state the nature of the complaint; and (3) include a copy of the written notification under reg 17(3) where one exists: reg 18(2). The Office of Public Sector Information must publish its procedures for considering complaints so referred, and must consider any such complaint in accordance with its published procedures: reg 19(1), (2).

9 Any such notification must be in writing and must give reasons for the determination: ibid reg 19(4).

10 Ibid reg 19(3). Where the person or the public sector body is dissatisfied with any recommendation so made, the person or public sector body may request for it to be reviewed by the Advisory Panel on Public Sector

Information: reg 20(1). Any such request must (1) be in writing; (2) state the reason for the request for the review; and (3) include a copy of the written notification under reg 17(3) or 19(3) or both where one or both exist: reg 20(2).

11 The specified bodies for these purposes are the Office of Public Sector Information, Her Majesty's Stationery Office and the Office of the Queen's Printer for Scotland: *ibid* reg 18(4).

12 *Ie* a complaint made under *ibid* reg 17(2).

13 *Ibid* reg 18(3). Any such complaint must (1) be in writing; (2) state the nature of the complaint; and (3) include a copy of the written notification under reg 17(3) where one exists: reg 18(5).

14 Any such notification must be in writing and must give reasons for the recommendation: *ibid* reg 21(4).

15 *Ibid* reg 21(3). The Advisory Panel on Public Sector Information must publish its procedures for considering complaints referred to it under reg 18(3) and for conducting reviews under reg 20(1), and must deal with any complaint so referred or any request for such a review in accordance with its published procedures: reg 21(1), (2).

UPDATE

583-587 Statutory Right of Access to Information held by Public Authorities

As to the re-use of public sector information see the Re-use of Public Sector Information Regulations 2005, SI 2005/1515; and PARA 587A.

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(2) EXEMPT INFORMATION

588. Information accessible to applicant by other means.

Information¹ which is reasonably accessible to the applicant² is exempt information³. For this purpose, (1) information may be reasonably accessible to the applicant even though it is accessible only on payment⁴, and (2) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority⁵ or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment⁶. Information which is held by a public authority and does not fall within head (2) above is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme⁷ and any payment required is specified in, or determined in accordance with, the scheme⁸.

1 For the meaning of 'information' see para 583 note 1 ante.

2 *Ie* other than under the Freedom of Information Act 2000 s 1 (see para 583 ante).

3 *Ibid* s 21(1). Information contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland cannot be exempt information by virtue of s 21: s 64(1). For the meaning of 'historical record' see para 590 note 24 post.

Part II (ss 21-44) comes into force on 30 November 2005, unless the Lord Chancellor by order appoints an earlier date: see s 87(3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, 2001/3500, art 8, Sch 2 Pt I para 8(1)(o)). As to the commencement of the Freedom of Information Act 2000 Pt VI (ss 62-67) see para 590 note 24 post.

- 4 Freedom of Information Act 2000 s 21(2)(a).
- 5 As to public authorities see para 583 note 2 ante.
- 6 Freedom of Information Act 2000 s 21(2)(b).
- 7 As to publication schemes see para 586 ante.
- 8 Freedom of Information Act 2000 s 21(3).

UPDATE

588 Information accessible to applicant by other means

NOTE 3--Freedom of Information Act 2000 Pt II in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/589. Information intended for future publication.

589. Information intended for future publication.

Information¹ is exempt information if (1) it is held by the public authority² with a view to its publication, by the authority or any other person, at some future date (whether determined or not), (2) it was already held with a view to such publication at the time when the request for information was made, and (3) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in head (1) above³.

The duty to confirm or deny⁴ does not arise if, or to the extent that, compliance with that duty would involve the disclosure of any information (whether or not already recorded) which falls within heads (1) to (3) above⁵.

- 1 For the meaning of 'information' see para 583 note 1 ante.
- 2 As to public authorities see para 583 note 2 ante.
- 3 Freedom of Information Act 2000 s 22(1). Information contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland cannot be exempt information by virtue of s 22: s 64(1). For the meaning of 'historical record' see para 590 note 24 post.
- As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see para 590 note 24 post.
- 4 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.
- 5 Freedom of Information Act 2000 s 22(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/590. Information relating to security or defence, or international or internal relations.

590. Information relating to security or defence, or international or internal relations.

Information¹ held by a public authority² is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the specified security bodies³. A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the specified bodies is⁴ conclusive evidence of that fact⁵. The duty to confirm or deny⁶ does not arise if, or to the extent that, compliance with that duty would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the specified bodies⁷.

Information which does not fall within the provisions described above⁸ is exempt information if exemption from the duty to communicate the information to the applicant⁹ is required for the purpose of safeguarding national security¹⁰. Similarly, the duty to confirm or deny does not arise if, or to the extent that, exemption from that duty is required for the purpose of safeguarding national security¹¹. A certificate signed by a Minister of the Crown certifying that exemption from either duty is, or at any time was, required for the purpose of safeguarding national security is¹² conclusive evidence of that fact¹³.

Information is exempt information if its disclosure would, or would be likely to, prejudice the defence of the British Islands or of any colony, or the capability, effectiveness or security of any relevant forces¹⁴. The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any such the matters¹⁵.

Information is exempt information if its disclosure would, or would be likely to, prejudice (1) relations between the United Kingdom and any other state¹⁶, (2) relations between the United Kingdom and any international organisation¹⁷ or international court¹⁸, (3) the interests of the United Kingdom abroad, or (4) the promotion or protection by the United Kingdom of its interests abroad¹⁹. Information is also exempt information if it is confidential information²⁰ obtained from a state other than the United Kingdom or from an international organisation or international court²¹. The duty to confirm or deny does not arise if, or to the extent that, that duty would, or would be likely to, prejudice any of the matters mentioned in heads (1) to (4) above, or would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a state other than the United Kingdom or from an international organisation or international court²².

Information is exempt information if its disclosure would, or would be likely to, prejudice relations between any administration in the United Kingdom²³ and any other such administration²⁴. The duty to confirm or deny does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any such relations²⁵.

1 For the meaning of 'information' see para 583 note 1 ante.

2 As to public authorities see para 583 note 2 ante.

3 Freedom of Information Act 2000 s 23(1). The specified bodies are: (1) the Security Service, (2) the Secret Intelligence Service, (3) the Government Communications Headquarters, (4) the special forces, (5) the Tribunal established under the Regulation of Investigatory Powers Act 2000 s 65, (6) the Tribunal established under the Interception of Communications Act 1985 s 7, (7) the Tribunal established under the Security Service Act 1989 s 5, (8) the Tribunal established under the Intelligence Services Act 1994 s 9, (9) the Security Vetting Appeals Panel, (10) the Security Commission, (11) the National Criminal Intelligence Service, and (12) the Service Authority for the National Criminal Intelligence Service: Freedom of Information Act 2000 s 23(3). 'The Government Communications Headquarters' includes any unit or part of a unit of the armed forces of the Crown

which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions: s 23(4).

In relation to any information falling within s 23(1) which is contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland, s 2(3) (see para 583 ante) has effect with the omission of the reference to s 23: s 64(2).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see note 24 infra.

4 This is subject to *ibid* s 60, under which provision is made for appeal against the issue of such a certificate (in force on 30 November 2005, unless the Lord Chancellor appoints an earlier date).

5 *Ibid* s 23(2). The power conferred by s 23(2) or s 24(3) on a Minister of the Crown is exercisable only by a Minister who is a member of the Cabinet or by the Attorney General, the Advocate General for Scotland or the Attorney General for Northern Ireland: s 25(3).

A document purporting to be a certificate under s 23(2) or s 24(3) must be received in evidence and deemed to be such a certificate unless the contrary is proved: s 25(1). A document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that Minister is, in any legal proceedings, evidence of that certificate: s 25(2).

6 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

7 Freedom of Information Act 2000 s 23(5).

8 It does not fall within *ibid* s 23(1).

9 It the duty under *ibid* s 1(1)(b): see para 583 ante.

10 *Ibid* s 24(1).

11 *Ibid* s 24(2).

12 This is subject to *ibid* s 60, under which provision is made for appeal against the issue of such a certificate (in force on 30 November 2005, unless the Lord Chancellor appoints an earlier date).

13 *Ibid* s 24(3). As to the exercise of this power see note 5 supra. Such a certificate under may identify the information to which it applies by means of a general description and may be expressed to have prospective effect: s 24(4). As to receiving such a certificate in evidence see note 5 supra.

14 *Ibid* s 26(1). 'Relevant forces' means the armed forces of the Crown, and any forces co-operating with those forces, or any part of any of those forces: s 26(2).

15 *Ibid* s 26(3).

16 'State' includes the government of any state and any organ of its government, and references to a state other than the United Kingdom include references to any territory outside the United Kingdom: *ibid* s 27(5).

17 'International organisation' means any international organisation whose members include any two or more states, or any organ of such an organisation: *ibid* s 27(5).

18 'International court' means any international court which is not an international organisation and which is established (1) by a resolution of an international organisation of which the United Kingdom is a member, or (2) by an international agreement to which the United Kingdom is a party: *ibid* s 27(5).

19 *Ibid* s 27(1).

20 For these purposes any information obtained from a state, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the state, organisation or court to expect that it will be so held: *ibid* s 27(3).

21 *Ibid* s 27(2).

22 *Ibid* s 27(4).

23 'Administration in the United Kingdom' means (1) the government of the United Kingdom, (2) the Scottish Administration, (3) the Executive Committee of the Northern Ireland Assembly, or (4) the National Assembly for Wales: *ibid* s 28(2).

24 *Ibid* s 28(1). Information contained in a historical record cannot be exempt information by virtue of s 28: s 63(1). A record becomes a 'historical record' at the end of the period of 30 years beginning with the year following that in which it was created: s 62(1). Where records created at different dates are for administrative purposes kept together in one file or other assembly, all the records in that file or other assembly are to be treated for the purposes of Pt VI (ss 62-67) as having been created when the latest of those records was created: s 62(2).

Part VI comes into force on 30 November 2005 unless the Lord Chancellor appoints an earlier date.

25 *Ibid* s 28(3). Compliance with the duty to confirm or deny in relation to a historical record is not to be taken to be capable of having any of the effects referred to in s 28(3): s 63(2).

UPDATE

590 Information relating to security or defence, or international or internal relations

NOTE 3--Add head (13) the Serious Organised Crime Agency: Freedom of Information Act 2000 s 23(3) (amended by the Serious Organised Crime and Police Act 2005 Sch 4 para 159, Sch 17 Pt 2).

NOTE 23--Freedom of Information Act 2000 s 28(2) amended: SI 2007/1388.

NOTE 24--Freedom of Information Act 2000 Pt VI in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/591. The economy.

591. The economy.

Information¹ is exempt information if its disclosure would, or would be likely to, prejudice the economic interests of the United Kingdom or of any part of the United Kingdom, or the financial interests of any administration in the United Kingdom².

1 For the meaning of 'information' see para 583 note 1 ante.

2 Freedom of Information Act 2000 s 29(1). For the meaning of 'administration in the United Kingdom' see para 590 note 23 ante.

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/592. Investigations and proceedings conducted by public authorities.

592. Investigations and proceedings conducted by public authorities.

Information¹ held by a public authority² is exempt information if it has at any time been held by the authority for the purposes of:

- (1) any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence³, or whether a person charged with an offence is guilty of it⁴;
- (2) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings⁵ which the authority has power to conduct⁶; or
- (3) any criminal proceedings which the authority has power to conduct⁷.

Information held by a public authority is exempt information if it was obtained or recorded by the authority for the purposes of its functions relating to

- (a) investigations falling within head (1) above,
- (b) criminal proceedings which the authority has power to conduct,
- (c) investigations (other than investigations falling within head (1) above) which are conducted by the authority for any specified purpose⁸ and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
- (d) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

it relates to the obtaining of information from confidential sources⁹.

The duty to confirm or deny¹⁰ does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of the provisions described above¹¹.

1 For the meaning of 'information' see para 583 note 1 ante.

2 As to public authorities see para 583 note 2 ante. In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in the Freedom of Information Act 2000 s 30(1)(b) or (c), (2) to the public authority include references to any officer of the authority, and in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department: s 30(4).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

3 'Offence' includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957: Freedom of Information Act 2000 s 30(5).

4 Ibid s 30(1)(a). Information contained in a historical record cannot be exempt information by virtue of s 30(1): s 63(1). As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante. For the meaning of 'historical record' see para 590 note 24 ante.

5 As to the meaning of 'criminal proceedings', including various proceedings under enactments relating to the armed forces, see ibid s 30(5) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1).

6 Freedom of Information Act 2000 s 30(1)(b).

7 Ibid s 30(1)(c).

8 Ie any of the purposes specified in ibid s 31(2) (see para 593 post).

9 Ibid s 30(2).

10 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

11 Freedom of Information Act 2000 s 30(3).

UPDATE

592 Investigations and proceedings conducted by public authorities

NOTES 3, 5--Definitions of 'offence' and 'criminal proceedings' amended: Armed Forces Act 2006 Sch 16 para 176.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/593. Law enforcement.

593. Law enforcement.

Information¹ which is not exempt information in relation to investigation and proceedings conducted by public authorities² is exempt information if its disclosure would, or would be likely to, prejudice any of the following³:

- (1) the prevention or detection of crime⁴;
- (2) the apprehension or prosecution of offenders⁵;
- (3) the administration of justice⁶;
- (4) the assessment or collection of any tax or duty or of any imposition of a similar nature⁷;
- (5) the operation of the immigration controls⁸;
- (6) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained⁹;
- (7) the exercise by any public authority of its functions for any of the purposes specified in heads (a) to (j) below¹⁰;
- (8) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes heads (a) to (j) below, by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment¹¹; or
- (9) certain inquiries held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976¹².

The purposes referred to in heads (7) and (8) above are:

- (a) ascertaining whether any person has failed to comply with the law¹³;
- (b) ascertaining whether any person is responsible for any conduct which is improper¹⁴;
- (c) ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise¹⁵;
- (d) ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on¹⁶;
- (e) ascertaining the cause of an accident¹⁷;
- (f) protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration¹⁸;

- (g) protecting the property of charities from loss or misapplication¹⁹;
- (h) recovering the property of charities²⁰;
- (i) securing the health, safety and welfare of persons at work²¹; and
- (j) protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work²².

The duty to confirm or deny²³ does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice any of the matters mentioned in heads (1) to (9) above²⁴.

1 For the meaning of 'information' see para 583 note 1 ante.

2 Ie by virtue of the Freedom of Information Act 2000 s 30: see para 592 ante. As to public authorities see para 583 note 2 ante.

3 Ibid s 31(1). Information cannot be exempt information by virtue of s 31 after the end of the period of 100 years beginning with the year following that in which the record containing the information was created: s 63(4). Compliance with the duty to confirm or deny (see para 583 ante) in relation to any record is not to be taken, at any time after the end of the period of 100 years beginning with the year following that in which the record was created, to be capable of prejudicing any of the matters referred to in s 31(1): s 63(5).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante.

4 Ibid s 31(1)(a).

5 Ibid s 31(1)(b).

6 Ibid s 31(1)(c).

7 Ibid s 31(1)(d).

8 Ibid s 31(1)(e).

9 Ibid s 31(1)(f).

10 Ibid s 31(1)(g).

11 Ibid s 31(1)(h).

12 See ibid s 31(1)(i).

13 Ibid s 31(2)(a).

14 Ibid s 31(2)(b).

15 Ibid s 31(2)(c).

16 Ibid s 31(2)(d).

17 Ibid s 31(2)(e).

18 Ibid s 31(2)(f).

19 Ibid s 31(2)(g).

20 Ibid s 31(2)(h).

21 Ibid s 31(2)(i).

22 Ibid s 31(2)(j).

23 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

24 Freedom of Information Act 2000 s 31(3).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/594. Court records.

594. Court records.

Information¹ held by a public authority² is exempt information if it is held only by virtue of being contained in (1) any document filed with, or otherwise placed in the custody of, a court³ for the purposes of proceedings in a particular cause or matter⁴; (2) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter; or (3) any document created by a court, or a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter⁵. Similarly, information held by a public authority is exempt information if it is held only by virtue of being contained in any document placed in the custody of, or created by, a person conducting an inquiry⁶ or arbitration⁷, for the purposes of the inquiry or arbitration⁸.

The duty to confirm or deny⁹ does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of the provisions described above¹⁰.

1 For the meaning of 'information' see para 583 note 1 ante.

2 As to public authorities see para 583 note 2 ante.

3 'Court' includes any tribunal or body exercising the judicial power of the state: Freedom of Information Act 2000 s 32(4)(a).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

4 'Proceedings in a particular cause or matter' includes any inquest or post-mortem examination: *ibid* s 32(4)(b).

5 *Ibid* s 32(1). Information contained in a historical record cannot be exempt information by virtue of s 32: s 63(1). As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante. For the meaning of 'historical record' see para 590 note 24 ante.

6 'Inquiry' means any inquiry or hearing held under any provision contained in, or made under, an enactment: *ibid* s 32(4)(c).

7 'Arbitration' means any arbitration to which the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION) applies: Freedom of Information Act 2000 s 32(4)(d).

8 *Ibid* s 32(2).

9 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

10 Freedom of Information Act 2000 s 32(3).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/595. Public authorities with audit functions.

595. Public authorities with audit functions.

Information¹ held by a public authority² which has specified audit functions is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in head (1) or (2) below³. Those functions are functions in relation to:

- (1) the audit of the accounts of other public authorities⁴; or
- (2) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions⁵.

The duty to confirm or deny⁶ does not arise in relation to a public authority with such functions, if, or to the extent that, compliance with that duty would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in head (1) or (2) above⁷.

1 For the meaning of 'information' see para 583 note 1 ante.

2 As to public authorities see para 583 note 2 ante.

3 Freedom of Information Act 2000 s 33(2).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

4 Ibid s 33(1)(a). Information contained in a historical record cannot be exempt information by virtue of s 33: s 63(1). As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante. For the meaning of 'historical record' see para 590 note 24 ante.

5 Ibid s 33(1)(b).

6 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

7 Freedom of Information Act 2000 s 33(3). Compliance with the duty to confirm or deny in relation to a historical record is not to be taken to be capable of having any of the effects referred to in s 33(3): s 63(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/596. Parliamentary privilege.

596. Parliamentary privilege.

Information¹ is exempt information if exemption from the duty to communicate it to the applicant² is required for the purpose of avoiding an infringement of the privileges of either House of Parliament³. The duty to confirm or deny⁴ does not apply if, or to the extent that, exemption from that duty is required for the purpose of avoiding an infringement of the privileges of either House of Parliament⁵. A certificate signed by the appropriate authority⁶ certifying that such exemption, is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament is conclusive evidence of that fact⁷.

1 For the meaning of 'information' see para 583 note 1 ante.

2 ie the duty under the Freedom of Information Act 2000 s 1(1)(b): see para 583 ante.

3 Ibid s 34(1).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

4 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

5 Freedom of Information Act 2000 s 34(2).

6 'Appropriate authority' means in relation to the House of Commons, the Speaker of that House, and in relation to the House of Lords, the Clerk of the Parliaments: *ibid* s 34(4).

7 *Ibid* s 34(3).

UPDATE

596 Parliamentary privilege

NOTE 3--See *Office of Government Commerce v Information Comr* [2008] EWHC 774 (Admin), [2009] 3 WLR 627, [2010] QB 98, [2008] All ER (D) 169 (Apr).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/597. Formulation of government policy and the conduct of public affairs.

597. Formulation of government policy and the conduct of public affairs.

Information¹ held by a government department or by the National Assembly for Wales is exempt information if it relates to (1) the formulation or development of government policy², (2) ministerial communications³, (3) the provision of advice by any of the Law Officers⁴ or any request for the provision of such advice, or (4) the operation of any ministerial private office⁵.

Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded (a) for the purposes of the duty to confirm or deny⁶, as relating to the formulation or development of government policy, or (b) for the purposes of the duty to communicate information to the applicant⁷, as relating to ministerial communications⁸.

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of heads (1) to (4) above⁹.

In making any determination as to whether the public interest in maintaining the exclusion of the duty to confirm or deny, or in maintaining the exemption from the duty to communicate¹⁰, in relation to information which is exempt information by virtue of head (1) above, regard must be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking¹¹.

Information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of the provisions described above, and information which is held by any other public authority¹², is exempt information if (except in relation to statistical information¹³), in the reasonable opinion of a qualified person¹⁴, disclosure of the information (i) would, or would be likely to, prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown, or the work of the Executive Committee of the Northern Ireland Assembly, or the work of the executive committee of the National Assembly for Wales, (ii) would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or (iii) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public

affairs¹⁵. The duty to confirm or deny does not arise in relation to such information if, or to the extent that, in the reasonable opinion of a qualified person, compliance with that duty would, or would be likely to, have any of the effects mentioned in heads (i) to (iii) above¹⁶.

1 For the meaning of 'information' see para 583 note 1 ante.

2 'Government policy' includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales: Freedom of Information Act 2000 s 35(5).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

3 'Ministerial communications' means any communications between Ministers of the Crown, between Northern Ireland Ministers, including Northern Ireland junior Ministers, or between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales: *ibid* s 35(5).

4 'The Law Officers' means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland: *ibid* s 35(5).

5 *Ibid* s 35(1). 'Ministerial private office' means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary: s 35(5).

Information contained in a historical record cannot be exempt information by virtue of s 35 or s 36: s 63(1). As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante. For the meaning of 'historical record' see para 590 note 24 ante.

6 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

7 Ie the duty under the Freedom of Information Act 2000 s 1(1)(b): see para 583 ante.

8 *Ibid* s 35(2).

9 *Ibid* s 35(3).

10 Ie as required by *ibid* s 2(1)(b) or (2)(b): see para 583 ante.

11 See *ibid* s 35(4).

12 As to public authorities see para 583 note 2 ante.

13 See the Freedom of Information Act 2000 s 36(4).

14 As to 'qualified persons' see *ibid* s 36(5)-(7).

15 See *ibid* s 36(1), (2).

16 See *ibid* s 36(3). Compliance with the duty to confirm or deny in relation to a historical record is not to be taken to be capable of having any of the effects referred to in s 36(3): s 63(2).

UPDATE

597 Formulation of government policy and the conduct of public affairs

TEXT AND NOTES--2000 Act ss 35, 36 amended to refer now to Welsh Assembly Government: SI 2007/1388.

NOTE 9--See *HM Treasury v Information Comr* [2009] EWHC 1811 (Admin), [2010] 2 All ER 55.

NOTE 15--The prejudice to effective conduct of public affairs exemption from a freedom of information request requires justification on a document-by-document basis; it is not

sufficient that a document falls within a certain class of documents: *Scottish Ministers v Scottish Information Comr* (2007) Times, 29 January, IH (decided under Freedom of Information (Scotland) Act 2002 s 30(c), which reads 'substantially prejudice' rather than 'prejudice' to the effective conduct of public affairs).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/598. Communications with Her Majesty; honours.

598. Communications with Her Majesty; honours.

Information¹ is exempt information if it relates to (1) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or (2) the conferring by the Crown of any honour or dignity². The duty to confirm or deny³ does not arise in relation to information which is (or if it were held by the public authority⁴ would be) exempt information by virtue of the provision described above⁵.

1 For the meaning of 'information' see para 583 note 1 ante.

2 Freedom of Information Act 2000 s 37(1). Information contained in a historical record cannot be exempt information by virtue of s 37(1)(a) (head (1) in the text): s 63(1). Information cannot be exempt information by virtue of s 37(1)(b) (head (2) in the text) after the end of the period of 60 years beginning with the year following that in which the record containing the information was created: s 63(3). For the meaning of 'historical record' see para 590 note 24 ante.

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante.

3 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

4 As to public authorities see para 583 note 2 ante.

5 Freedom of Information Act 2000 s 37(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/599. Health and safety.

599. Health and safety.

Information¹ is exempt information if its disclosure would, or would be likely to endanger the physical or mental health of any individual, or endanger the safety of any individual². The duty to confirm or deny³ does not arise if, or to the extent that, compliance with that duty would, or would be likely to, have either of the effects mentioned above⁴.

1 For the meaning of 'information' see para 583 note 1 ante.

2 Freedom of Information Act 2000 s 38(1).

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

- 3 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.
- 4 Freedom of Information Act 2000 s 38(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/600. Environmental information.

600. Environmental information.

Information¹ is exempt information if the public authority² holding it is obliged by regulations concerning the provision of environmental information³ to make the information available to the public in accordance with the regulations, or would be so obliged but for any exemption contained in the regulations⁴. The duty to confirm or deny⁵ does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of the provision described above⁶.

- 1 For the meaning of 'information' see para 583 note 1 ante.
- 2 As to public authorities see para 583 note 2 ante.
- 3 As to the power to make regulations relating to the provision of environmental information see the Freedom of Information Act 2000 s 74.
- 4 Ibid s 39(1). This does not limit the generality of s 21(1) (see para 588 ante): s 39(3). As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.
- 5 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.
- 6 Freedom of Information Act 2000 s 39(2).

UPDATE

600 Environmental information

TEXT AND NOTE 3--For 'regulations concerning the provision of environmental information' read 'environmental information regulations': 2000 Act s 39(1) (amended by the Environmental Information Regulations 2004, SI 2004/3391, reg 20). 'Environmental information regulations' means regulations made under the 2000 Act s 74, or regulations made under the European Communities Act 1972 s 2(2) for the purpose of implementing any Community obligation relating to public access to, and the dissemination of, information on the environment: 2000 Act s 39(1A) (added by SI 2004/3391 reg 20).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/601. Personal information.

601. Personal information.

Provision is made for the exemption of personal information from the duties imposed by the Freedom of Information Act 2000¹.

1 See the Freedom of Information Act 2000 s 40; and para 534 ante.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/602. Information provided in confidence.

602. Information provided in confidence.

Information¹ is exempt information if it was obtained by the public authority² from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under the Freedom of Information Act 2000) by the public authority holding it would constitute a breach of confidence actionable by that or any other person³. The duty to confirm or deny⁴ does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with that duty would (apart from the Act) constitute an actionable breach of confidence⁵.

1 For the meaning of 'information' see para 583 note 1 ante.

2 As to public authorities see para 583 note 2 ante.

3 Freedom of Information Act 2000 s 41(1). As to breach of confidence generally see para 401 et seq ante. As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.

4 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

5 Freedom of Information Act 2000 s 41(2).

UPDATE

602 Information provided in confidence

NOTE 3--The confidentiality of medical records survives the patient's death: *Bluck v Information Comr* [2008] WTLR 1.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/603. Legal professional privilege.

603. Legal professional privilege.

Information¹ in respect of which a claim to legal professional privilege² could be maintained in legal proceedings is exempt information³. The duty to confirm or deny⁴ does not arise if, or to the extent that, compliance with that duty would involve the disclosure of any information

(whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings⁵.

1 For the meaning of 'information' see para 583 note 1 ante.

2 See CIVIL PROCEDURE VOL 11 (2009) PARA 558 ET SEQ.

3 Freedom of Information Act 2000 s 42(1). Information contained in a historical record cannot be exempt information by virtue of s 42: s 63(1). For the meaning of 'historical record' see para 590 note 24 ante.

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante.

4 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

5 Freedom of Information Act 2000 s 42(2). Compliance with the duty to confirm or deny in relation to a historical record is not to be taken to be capable of having any of the effects referred to in s 42(2): s 63(2).

UPDATE

603 Legal professional privilege

NOTE 3--See *Department for Business Enterprise and Regulatory Reform v O'Brien* [2009] EWHC 164 (QB), [2009] All ER (D) 92 (Feb) (public interest in non-disclosure of legal professional privilege information carried significant weight that would always have to be considered in weighing public interest in maintaining exemption).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/604. Commercial interests.

604. Commercial interests.

Information¹ is exempt information if it constitutes a trade secret². Information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority³ holding it⁴. The duty to confirm or deny⁵ does not arise if, or to the extent that, compliance with that duty would, or would be likely to, prejudice such interests⁶.

1 For the meaning of 'information' see para 583 note 1 ante.

2 Freedom of Information Act 2000 s 43(1). Information contained in a historical record cannot be exempt information by virtue of s 43: s 63(1). For the meaning of 'historical record' see para 590 note 24 ante.

As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante. As to the commencement of Pt VI (ss 62-67) see para 590 note 24 ante.

3 As to public authorities see para 583 note 2 ante.

4 Freedom of Information Act 2000 s 43(2).

5 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.

6 Freedom of Information Act 2000 s 43(3). Compliance with the duty to confirm or deny in relation to a historical record is not to be taken to be capable of having any of the effects referred to in s 43(3): s 63(2).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(2) EXEMPT INFORMATION/605. Specific information not permitted to be disclosed.

605. Specific information not permitted to be disclosed.

Information¹ is exempt information if its disclosure (otherwise than under the Freedom of Information Act 2000) by the public authority² holding it (1) is prohibited by or under any enactment, (2) is incompatible with any Community obligation, or (3) would constitute or be punishable as a contempt of court³. The duty to confirm or deny⁴ does not arise if the confirmation or denial that would have to be given to comply with that duty would (apart from the Act) fall within any of heads (1) to (3) above⁵.

- 1 For the meaning of 'information' see para 583 note 1 ante.
- 2 As to public authorities see para 583 note 2 ante.
- 3 Freedom of Information Act 2000 s 44(1). As to contempt of court generally see CONTEMPT OF COURT. As to the commencement of Pt II (ss 21-44) see para 588 note 3 ante.
- 4 For the meaning of 'duty to confirm or deny' see para 583 note 4 ante.
- 5 Freedom of Information Act 2000 s 44(2).

UPDATE

605 Specific information not permitted to be disclosed

NOTE 3--See *British Union for the Abolition of Vivisection v Secretary of State for the Home Department* [2008] EWCA Civ 870, [2009] 1 All ER 44.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(3) FUNCTIONS OF THE LORD CHANCELLOR AND THE INFORMATION COMMISSIONER/606. Code of practice relating to discharge of functions.

(3) FUNCTIONS OF THE LORD CHANCELLOR AND THE INFORMATION COMMISSIONER

606. Code of practice relating to discharge of functions.

The Lord Chancellor must issue, and may from time to time revise, a code of practice providing guidance to public authorities¹ as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of certain functions² of the authorities³. The code of practice must, in particular, include provision relating to (1) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for

information⁴ to them; (2) the transfer of requests by one public authority to another public authority by which the information requested is or may be held; (3) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information; (4) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information; and (5) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information⁵. The code may make different provision for different public authorities⁶. Before issuing or revising any code the Lord Chancellor must consult the Information Commissioner⁷. The Lord Chancellor must lay before each House of Parliament any code or revised code⁸.

- 1 For the meaning of 'public authority' see para 583 note 2 ante.
- 2 Ie under the Freedom of Information Act 2000 Pt I (ss 1-20) (see para 583 et seq ante).
- 3 Ibid s 45(1) (s 45(1), (4), (5) amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).
- 4 For the meanings of 'information' and 'request for information' see para 583 note 1 ante.
- 5 Freedom of Information Act 2000 s 45(2).
- 6 Ibid s 45(3).
- 7 Ibid s 45(4) (as amended: see note 3 supra). As to the Commissioner see para 518 ante.
- 8 Ibid s 45(5) (as amended: see note 3 supra).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(3) FUNCTIONS OF THE LORD CHANCELLOR AND THE INFORMATION COMMISSIONER/607. Code of practice relating to records.

607. Code of practice relating to records.

The Lord Chancellor must issue, and may from time to time revise, a code of practice providing guidance to relevant authorities¹ as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records². For the purpose of facilitating the performance by the Public Record Office and other public authorities of their functions³ in relation to records which are public records⁴, the code may also include guidance as to the practice to be adopted in relation to the transfer of records⁵, and the practice of reviewing records before they are transferred⁶. In exercising his functions⁷, the Lord Chancellor must have regard to the public interest in allowing public access to information⁸ held by relevant authorities⁹. The code may make different provision for different relevant authorities¹⁰. Before issuing or revising any code the Lord Chancellor must consult the Information Commissioner¹¹. The Lord Chancellor must lay before each House of Parliament any code or revised code¹².

1 'Relevant authority' means any public authority, and any office or body which is not a public authority but whose administrative and departmental records are public records for the purposes of the Public Records Act 1958: Freedom of Information Act 2000 s 46(7). For the meaning of 'public authority' and 'body' see para 583 note 2 ante.

2 Ibid s 46(1).

3 Ie under the Freedom of Information Act 2000.

4 Ie for the purposes of the Public Records Act 1958 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 835).

5 Ie under the Public Records Act 1958 s 3(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 839).

6 Freedom of Information Act 2000 s 46(2).

7 Ie under *ibid* s 46.

8 For the meaning of 'information' see para 583 note 1 ante.

9 Freedom of Information Act 2000 s 46(3).

10 *Ibid* s 46(4).

11 *Ibid* s 46(5) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). As to the Commissioner see para 518 ante.

12 Freedom of Information Act 2000 s 46(6).

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(3) FUNCTIONS OF THE LORD CHANCELLOR AND THE INFORMATION COMMISSIONER/608. Functions of Information Commissioner.

608. Functions of Information Commissioner.

It is the duty of the Information Commissioner¹ to promote the following of good practice² by public authorities³ and, in particular, so to perform his functions⁴ as to promote the observance by public authorities of the requirements of the Freedom of Information Act 2000, and the provisions of the codes of practice⁵. The Commissioner must arrange for the dissemination in such form and manner as he considers appropriate of such information⁶ as it may appear to him expedient to give to the public about the operation of the Act, about good practice, and about other matters within the scope of his functions, and may give advice to any person as to any of those matters⁷. The Commissioner may, with the consent of any public authority, assess whether that authority is following good practice⁸. The Commissioner may charge such sums as he may with the consent of the Lord Chancellor determine for any services provided by the Commissioner⁹. The Commissioner must from time to time as he considers appropriate consult the Keeper of Public Records about the promotion by the Commissioner of the observance by public authorities of the provisions of the code of practice¹⁰ in relation to public records¹¹.

If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions¹² does not conform with that proposed in the codes of practice¹³, he may give to the authority a recommendation ('practice recommendation') specifying the steps which ought in his opinion to be taken for promoting such conformity¹⁴. A practice recommendation must be given in writing and must refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform¹⁵. Before giving to a public authority other than the Public Record Office a practice recommendation which relates to conformity with the code of practice¹⁶ in respect of records which are public records¹⁷, the Commissioner must consult the Keeper of Public Records¹⁸.

The Commissioner must lay annually a general report on the exercise of his functions¹⁹ before each House of Parliament²⁰. The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit²¹.

- 1 As to the Commissioner see para 518 ante.
- 2 'Good practice', in relation to a public authority, means such practice in the discharge of its functions as appears to the Commissioner to be desirable, and includes (but is not limited to) compliance with the requirements of the Freedom of Information Act 2000 and the provisions of the codes of practice under ss 45, 46 (see paras 606, 607 ante): s 47(6).
- 3 For the meaning of 'public authority' see para 583 note 2 ante.
- 4 Ie under the Freedom of Information Act 2000.
- 5 Ibid s 47(1). As to the codes of practice see paras 606, 607 ante.
- 6 For the meaning of 'information' see para 583 note 1 ante.
- 7 Freedom of Information Act 2000 s 47(2).
- 8 Ibid s 47(3).
- 9 Ibid s 47(4) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).
- 10 Ie under the Freedom of Information Act 2000 s 46 (see para 607 ante).
- 11 Ibid s 47(5)(a). Public records are records for the purposes of the Public Records Act 1958 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 835).
- 12 Ie under the Freedom of Information Act 2000.
- 13 As to the codes of practice see paras 606, 607 ante.
- 14 Freedom of Information Act 2000 s 48(1). Section 48(1), (2) in force so far as relating to the issue of practice recommendations, and the issue and enforcement of information notices, relating to the conformity with the code of practice under s 45 (see para 606 ante) of the practice of public authorities in relation to the exercise of their functions under the publication scheme provisions (see para 586 ante): Freedom of Information Act 2000 (Commencement No 2) Order 2002, SI 2002/2812.
- 15 Freedom of Information Act 2000 s 48(2) (in force in part: see note 14 supra).
- 16 Ie under ibid s 46 (see para 607 ante).
- 17 Ie for the purposes of the Public Records Act 1958 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 835).
- 18 Freedom of Information Act 2000 s 48(3) (in force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor: see s 87(3) (as amended)).
- 19 Ie under the Freedom of Information Act 2000.
- 20 Ibid s 49(1).
- 21 Ibid s 49(2).

UPDATE

608 Functions of Information Commissioner

NOTE 14--Freedom of Information Act 2000 s 48(1), (2) in force for all purposes: SI 2004/3122. SI 2002/2812 amended: SI 2005/3239.

NOTE 18--Now in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/609. Application for decision by Information Commissioner.

(4) ENFORCEMENT AND APPEALS

609. Application for decision by Information Commissioner.

Any person (referred to as 'the complainant') may apply to the Information Commissioner¹ for a decision whether, in any specified respect, a request for information² made by the complainant to a public authority³ has been dealt with⁴. On receiving such an application, the Commissioner must make a decision unless it appears to him (1) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice⁵; (2) that there has been undue delay in making the application; (3) that the application is frivolous or vexatious; or (4) that the application has been withdrawn or abandoned⁶. Where the Commissioner has received an application, he must either notify the complainant that he has not made any decision as a result of the application and of his grounds for not doing so, or serve notice of his decision (referred to as a 'decision notice') on the complainant and the public authority⁷. Where the Commissioner decides that a public authority has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so⁸, or has failed to comply with any of the statutory requirements⁹, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken¹⁰. A decision notice must contain particulars of the right of appeal¹¹. Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal¹².

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor¹³.

1 As to the Commissioner see para 518 ante.

2 For the meanings of 'information' and 'request for information' see para 583 note 1 ante.

3 For the meaning of 'public authority' see para 583 note 2 ante.

4 Freedom of Information Act 2000 s 50(1). Section 50 has effect subject to s 53 (see para 612 post): s 50(7).

5 Ie under *ibid* s 45 (see para 606 ante).

6 *Ibid* s 50(2).

7 *Ibid* s 50(3).

8 Ie by *ibid* s 1(1) (see para 583 ante).

9 Ie the requirements of *ibid* ss 11, 17 (see paras 584, 585 ante).

10 *Ibid* s 50(4).

11 *Ibid* s 50(5). As to the right of appeal see s 57; and para 614 post.

12 Ibid s 50(6).

13 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

609 Application for decision by Information Commissioner

NOTE 4--See *Corporate Officer of the House of Commons v The Information Comr* [2008] EWHC 1084 (Admin), [2009] 3 All ER 403.

NOTE 7--Where a request under the 2000 Act s 1 for information has been rejected, the Commissioner has jurisdiction under s 50 to deal with a complaint concerning whether that rejection was proper: *British Broadcasting Corp v Sugar* [2009] UKHL 9, [2009] 4 All ER 111.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/610. Information notices.

610. Information notices.

If the Information Commissioner¹ has (1) received an application², or (2) reasonably requires any information³ for the purpose of determining whether a public authority⁴ has complied or is complying with any of the statutory requirements⁵, or for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions conforms with that proposed in the codes of practice⁶, he may serve the authority with a notice (referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to statutory compliance⁷ or to conformity with the code of practice as is so specified⁸. An information notice must contain (a) in a case falling within head (1) above, a statement that the Commissioner has received an application⁹, or (b) in a case falling within head (2) above, a statement that the Commissioner regards the specified information as relevant for either of the purposes referred to in that head, and of his reasons for regarding that information as relevant for that purpose¹⁰. An information notice must also contain particulars of the right of appeal¹¹. The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal¹². An authority is not required to furnish the Commissioner with any information in respect of any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights¹³, or any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings¹⁴ (including proceedings before the Tribunal¹⁵) and for the purposes of such proceedings¹⁶. The Commissioner may cancel an information notice by written notice to the authority on which it was served¹⁷.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor¹⁸.

- 1 As to the Commissioner see para 518 ante.
- 2 Ie under the Freedom of Information Act 2000 s 50 (see para 609 ante).
- 3 'Information' includes unrecorded information: *ibid* s 51(8).
- 4 For the meaning of 'public authority' see para 583 note 2 ante.
- 5 Ie under the Freedom of Information Act 2000 Pt I (ss 1-20) (see para 583 et seq ante).
- 6 As to the codes of practice see paras 606, 607 ante.
- 7 Ie with the Freedom of Information Act 2000 Pt I.
- 8 *Ibid* s 51(1).
- 9 Ie under *ibid* s 50: see para 609 ante.
- 10 *Ibid* s 51(2).
- 11 *Ibid* s 51(3). As to the right of appeal see s 57; and para 614 post.
- 12 *Ibid* s 51(4).
- 13 Ie under the Freedom of Information Act 2000.
- 14 Ie under or arising out of the Freedom of Information Act 2000.
- 15 As to the Tribunal see para 521 et seq ante.
- 16 Freedom of Information Act 2000 s 51(5). References to the client of a professional legal adviser in s 51(5) include references to any person representing such a client: s 51(6).
- 17 *Ibid* s 51(7).
- 18 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/611. Enforcement notices.

611. Enforcement notices.

If the Information Commissioner¹ is satisfied that a public authority² has failed to comply with any of the statutory requirements³, the Commissioner may serve the authority with a notice (referred to as 'an enforcement notice') requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements⁴. An enforcement notice must contain a statement of the requirement or

requirements⁵ with which the Commissioner is satisfied that the public authority has failed to comply and his reasons for reaching that conclusion, and particulars of the right of appeal⁶. An enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal⁷. The Commissioner may cancel an enforcement notice by written notice to the authority on which it was served⁸.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor⁹.

- 1 As to the Commissioner see para 518 ante.
- 2 For the meaning of 'public authority' see para 583 note 2 ante.
- 3 Ie under the Freedom of Information Act 2000 Pt I (ss 1-20) (see para 583 et seq ante).
- 4 Ibid s 52(1). Section 52 has effect subject to s 53 (see para 612 post): s 52(5).
- 5 Ie under the Freedom of Information Act 2000 Pt I.
- 6 Ibid s 52(2). As to the right of appeal; see s 57 and para 614 post.
- 7 Ibid s 52(3).
- 8 Ibid s 52(4).
- 9 See ibid s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/612. Exception from duty to comply with decision notice or enforcement notice.

612. Exception from duty to comply with decision notice or enforcement notice.

The following provisions apply to a decision notice¹ or enforcement notice² which: (1) is served on: (a) a government department³; (b) the National Assembly for Wales⁴; or (c) any public authority⁵ designated by an order made by the Lord Chancellor⁶, and (2) relates to a failure, in respect of one or more requests for information⁷: (a) to comply with the duty to confirm or deny⁸ in respect of specified information⁹ stating that that duty does not arise, or (b) to comply with the duty to communicate information¹⁰ in respect of exempt information¹¹.

Such decision notice or enforcement notice ceases to have effect if, not later than the 20th working day¹² following the effective date¹³, the accountable person¹⁴ in relation to that authority gives the Information Commissioner¹⁵ a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within head (2) above¹⁶. Where the accountable person gives such a certificate to the Commissioner he must as soon as practicable thereafter lay a

copy of the certificate before each House of Parliament, or the National Assembly for Wales, in any case where the certificate relates to a decision notice or enforcement notice which has been served on the National Assembly for Wales or any Welsh public authority¹⁷. Where the accountable person gives a certificate to the Commissioner¹⁸ in relation to a decision notice, the accountable person must, on doing so or as soon as reasonably practicable after doing so, inform the person who is the complainant¹⁹ of the reasons for his opinion²⁰. The accountable person is not obliged to provide such information if, or to the extent that, compliance would involve the disclosure of exempt information²¹.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor²².

- 1 For the meaning of 'decision notice' see para 609 ante.
- 2 For the meaning of 'enforcement notice' see para 611 ante.
- 3 For the meaning of 'government department' see para 583 note 2 ante.
- 4 As to the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.
- 5 For the meaning of 'public authority' see para 583 note 2 ante.
- 6 Freedom of Information Act 2000 s 53(1)(a) (s 53(1), (5) amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Before making such an order, the Lord Chancellor must, if the order relates to a Welsh public authority, consult the National Assembly for Wales: Freedom of Information Act 2000 s 53(5) (as so amended).
- 7 For the meanings of 'information' and 'request for information' see para 583 note 1 ante.
- 8 As to the duty to confirm or deny see para 583 ante.
- 9 Ie information which falls within any provision of the Freedom of Information Act 2000 Pt II (ss 21-44) (see para 588 et seq ante).
- 10 Ie under *ibid* s 1(1)(b) (see para 583 ante).
- 11 *Ibid* s 53(1)(b). For the meaning of 'exempt information' see para 583 note 4 ante.
- 12 'Working day' has the same meaning as in *ibid* s 10: s 53(9); see para 584 note 8 ante.
- 13 'The effective date', in relation to a decision notice or enforcement notice, means the day on which the notice was given to the public authority, or where an appeal under *ibid* s 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn: s 53(4).
- 14 'The accountable person' in relation to the National Assembly for Wales or any Welsh public authority, means the Assembly First Secretary, and in relation to any other public authority, means a Minister of the Crown who is a member of the Cabinet, or the Attorney General: *ibid* s 53(8).
- 15 As to the Commissioner see para 518 ante.
- 16 Freedom of Information Act 2000 s 53(2).
- 17 *Ibid* s 53(3). 'Welsh public authority' means any public authority listed in Sch 1 Pts II-IV, VI (as amended) whose functions are exercisable only or mainly in or as regards Wales, other than an excluded authority, or any public authority which is an Assembly subsidiary as defined by the Government of Wales Act 1998 s 99(4) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Freedom of Information Act 2000 s 83(1). 'Excluded authority' means a public authority which is designated by the Lord Chancellor by order as an excluded authority: s 83(2) (s 83(2), (3) amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500). Before making such an order, the Lord Chancellor must consult the National Assembly for Wales: Freedom of Information Act 2000 s 83(3) (as so amended). As to public authorities designated as excluded authorities see the Freedom of Information (Excluded Welsh Authorities Order) 2002, SI 2002/2832.
- 18 Ie under the Freedom of Information Act 2000 s 53(2).
- 19 Ie for the purposes of *ibid* s 50: see para 609 ante.

20 Ibid s 53(6).

21 Ibid s 53(7).

22 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

612 Exception from duty to comply with decision notice or enforcement notice

TEXT AND NOTES--2000 Act ss 53, 83 amended to refer now to Welsh Assembly Government: SI 2007/1388.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/613. Failure to comply with notice.

613. Failure to comply with notice.

If a public authority¹ has failed to comply with (1) so much of a decision notice² as requires steps to be taken, (2) an information notice³, or (3) an enforcement notice⁴, the Information Commissioner⁵ may certify in writing to the court⁶ that the public authority has failed to comply with that notice⁷. A public authority which, in purported compliance with an information notice (a) makes a statement which it knows to be false in a material respect, or (b) recklessly makes a statement which is false in a material respect, is to be taken to have failed to comply with the notice⁸. Where a failure to comply is certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court⁹.

The Freedom of Information Act 2000 does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by the Act¹⁰.

Provision is made with respect to the powers of entry and inspection, including the issue, execution and return of warrants, the matters exempt from inspection and seizure and offences¹¹.

The provisions described above will come fully into force on 30 November 2005, unless an earlier date is appointed by the Lord Chancellor¹².

1 For the meaning of 'public authority' see para 583 note 2 ante.

2 For the meaning of 'decision notice' see para 609 ante.

3 For the meaning of 'information notice' see para 610 ante.

4 For the meaning of 'enforcement notice' see para 611 ante.

- 5 As to the Commissioner see para 518 ante.
- 6 'The court' means the High Court: Freedom of Information Act 2000 s 54(4).
- 7 Ibid s 54(1).
- 8 Ibid s 54(2).
- 9 Ibid s 54(3).
- 10 Ibid s 56(1). This does not affect the powers of the Commissioner under s 54: s 56(2).
- 11 See *ibid* s 55, Sch 3.
- 12 See *ibid* s 87(1), (3) (amended by the Transfer of Functions (Miscellaneous) Order 2001, SI 2001/3500).

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(4) ENFORCEMENT AND APPEALS/614. Appeals.

614. Appeals.

Where a decision notice¹ has been served, the complainant² or the public authority³ may appeal to the Tribunal⁴ against the notice⁵. A public authority on which an information notice⁶ or an enforcement notice⁷ has been served by the Information Commissioner⁸ may appeal to the Tribunal against the notice⁹. If on an appeal the Tribunal considers that the notice against which the appeal is brought is not in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal must dismiss the appeal¹⁰. On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based¹¹. Any party to an appeal to the Tribunal¹² may appeal from the decision of the Tribunal on a point of law to the appropriate court, and that court must be the High Court of Justice in England if the address of the public authority is in England or Wales¹³.

Appeal may be made against the issue of a national security certificate¹⁴.

Provision is made as to the procedure on appeals under the Freedom of Information Act 2000¹⁵.

- 1 For the meaning of 'decision notice' see para 609 ante.
- 2 For the meaning of 'complainant' see para 609 ante.
- 3 For the meaning of 'public authority' see para 583 note 2 ante.
- 4 As to the 'Tribunal' see para 521 et seq ante.
- 5 Freedom of Information Act 2000 s 57(1) (in force as from 30 November 2005, unless the Lord Chancellor appoints an earlier date).

6 For the meaning of 'information notice' see para 610 ante.

7 For the meaning of 'enforcement notice' see para 611 ante.

8 As to the Commissioner see para 518 ante.

9 Freedom of Information Act 2000 s 57(2). In relation to a decision notice or enforcement notice which relates to any information which is (or, if it existed, would be) contained in a transferred public record, other than information which the responsible authority has designated as open information for the purposes of s 66 (not yet in force), and to a matter which by virtue of s 66(3) or (4) fails to be determined by the responsible authority instead of the appropriate records authority, s 57(1), (2) have effect as if the reference to the public authority were a reference to the public authority or the responsible authority: s 57(3) (in force as from 30 November 2005, unless the Lord Chancellor appoints an earlier date). For the meaning of information see para 583 note 1 ante. For the meanings of 'transferred public record', 'responsible authority', and 'appropriate records authority' see para 584 ante.

10 Ibid s 58(1).

11 Ibid s 58(2).

12 Ie under ibid s 57.

13 See ibid s 59.

14 See ibid s 60 (in force as from 30 November 2005, unless the Lord Chancellor appoints an earlier date). As to such certificates see ss 23(2), 24(3); and para 590 ante.

15 See ibid s 61, Sch 4, which applies the provisions of the Data Protection Act 1998 Sch 6 to such appeals: see para 568 et seq ante.

UPDATE

609-614 Enforcement and Appeals

Provisions now fully in force on 1 January 2005: SI 2004/3122.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(5) MISCELLANEOUS AND GENERAL PROVISIONS/615. Disclosure of information between the Information Commissioner and ombudsmen.

(5) MISCELLANEOUS AND GENERAL PROVISIONS

615. Disclosure of information between the Information Commissioner and ombudsmen.

The Information Commissioner¹ may disclose to a specified person² any information³ obtained by, or furnished to, the Commissioner under or for the purposes of the Freedom of Information Act 2000 or the Data Protection Act 1998 if it appears to the Commissioner that the information relates to a matter which could be the subject of an investigation by that person⁴.

1 As to the Commissioner see para 518 ante.

2 Ie the persons specified in the Freedom of Information Act 2000 s 76(1) Table Column 1. The specified persons are the Parliamentary Commissioner for Administration; the Health Service Commissioner for England; the Health Service Commissioner for Wales; the Health Service Commissioner for Scotland; a Local

Commissioner as defined by the Local Government Act 1974 s 23(3); the Commissioner for Local Administration in Scotland; the Scottish Parliamentary Commissioner for Administration; the Welsh Administration Ombudsman; the Northern Ireland Commissioner for Complaints; the Assembly Ombudsman for Northern Ireland: Freedom of Information Act 2000 s 76(1) Table Column 1.

3 For the meaning of 'information' see para 583 note 1 ante.

4 Freedom of Information Act 2000 s 76(1).

UPDATE

615 Disclosure of information between the Information Commissioner and ombudsmen

NOTE 2--Local Government Act 1974 s 23(3) and Freedom of Information Act 2000 s 76(1) Table amended: Public Services Ombudsman (Wales) Act 2005 Sch 6 paras 8(4), 71, Sch 7.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(5) MISCELLANEOUS AND GENERAL PROVISIONS/616. Application to government departments.

616. Application to government departments.

For the purposes of the Freedom of Information Act 2000 each government department¹ must be treated as a person separate from any other government department². That does not enable a government department which is not a Northern Ireland department to claim³ that the disclosure of any information by it would constitute a breach of confidence actionable by any other government department (not being a Northern Ireland department)⁴.

1 For the meaning of 'government department' see para 583 note 2 ante.

2 Freedom of Information Act 2000 s 81(1).

3 Ie for the purposes of *ibid* s 41(1)(b).

4 *Ibid* s 81(2)(a). A government department is not liable to prosecution under the Freedom of Information Act 2000, but s 77 and Sch 3 para 12 apply to a person in the public service of the Crown as they apply to any other person: s 81(3). Section 77, Sch 3 also apply to a person acting on behalf of either House of Parliament as they apply to any other person: s 81(4). As to breach of confidence generally see para 401 et seq ante.

UPDATE

616 Application to government departments

NOTE 4--2000 Act s 81(3), (45) amended: SI 2007/1388.

Halsbury's Laws of England/CONFIDENCE AND DATA PROTECTION (VOLUME 8(1) (2003 REISSUE))/3. THE FREEDOM OF INFORMATION ACT 2000/(5) MISCELLANEOUS AND GENERAL PROVISIONS/617. Orders and regulations.

617. Orders and regulations.

Provision is made with respect to the procedure for the making of orders and regulations under the Freedom of Information Act 2000¹.

1 See the Freedom of Information Act 2000 s 82.